

EXHIBIT A

Press Release

Rimini Street Sues Oracle

Leading Support Provider Aims to End Oracle's Campaign of Anticompetitive Tactics

Las Vegas, March 29, 2010 – Rimini Street, Inc., the leading third-party maintenance and support provider for enterprise software, including Oracle Corporation's (NASDAQ: ORCL) for Siebel, PeopleSoft, and JD Edwards software, and SAP AG (NYSE:SAP) software, today announced that it filed suit against Oracle in U.S. District Court for the District of Nevada by presenting counterclaims alleging copyright misuse, defamation, disparagement, trade libel, and unfair competition under the California Business and Professions Code. With its filing, Rimini Street aims to end Oracle's five year campaign of anticompetitive tactics against Rimini Street that most recently includes a baseless lawsuit. Additionally, Rimini Street announced today that it filed its response to Oracle's complaint, showing Rimini Street's business processes and procedures are entirely legal and vehemently denying Oracle's false and malicious allegations.

Rimini Street is Oracle's Primary Competition for Annual Support Services

Rimini Street is Oracle's fastest-growing and leading competitor for the annual support of Oracle's Siebel, PeopleSoft, and JD Edwards software products. In 2009, Rimini Street saw growth of more than 270 percent in year-over-year revenue, doubled its global workforce to 160 professionals, and accumulated nearly \$150 million in sales backlog serving hundreds of Global, Fortune 500, mid-market, and public sector organizations around the world.

Oracle has a Long History of Trying to Stifle Rimini Street Competition

Oracle and its predecessors began a systematic campaign to disrupt and halt Rimini Street's business since the inception of the company in 2005. As Rimini Street's success grew, so did Oracle's apparent determination and efforts to disrupt Rimini Street's growth. Rimini Street's response to Oracle's complaint details examples of Oracle's business interference over many years including:

Initially, beginning in September 2005, Oracle's efforts consisted of numerous hostile letters. Over the years, Rimini Street responded to each letter, explained the appropriateness of Rimini Street's practices and procedures, and repeatedly offered to meet and discuss any questions or concerns Oracle might have about Rimini Street processes and procedures.

In June 2007, Oracle interfered with authorized work on behalf of Rimini Street clients by changing its website usage terms. Rimini Street wrote Oracle about the anticompetitive tactic against Rimini Street and informed Oracle that the change was likely a breach of Oracle's client license agreements, which expressly prevent service rights degradation. As such, the changes were not enforceable.

In December 2008, Oracle escalated its tactics by intentionally blocking Rimini Street's IP addresses and interfering with Rimini Street's authorized work on behalf of a large client switching from Oracle to Rimini Street support. After correspondence from both the client and Rimini Street demanding Oracle cease and desist, Oracle stopped the interference.

Most recently, in January 2010, Oracle once again escalated its anticompetitive tactics, this time through litigation. Oracle filed a baseless lawsuit against Rimini Street, choosing to ignore Rimini Street's numerous invitations for dialogue, offer to view internal Rimini Street information, and even the opportunity to engage a third party auditor.

Oracle Chooses Competition in the Courtroom Rather than the Marketplace

In February 2009, Rimini Street sought to stop Oracle's campaign of anticompetitive actions once and for all by again requesting and finally being granted a call with Oracle representatives. On the call, Rimini Street offered to share Rimini Street internal information and/or work out an agreement that would utilize an independent third party auditor reporting back to both parties to confirm Rimini Street's compliance with its standard processes and procedures. Oracle never responded to any of Rimini Street's proposals.

Instead, Oracle filed a baseless lawsuit against Rimini Street in an apparent effort to try and protect its 95% dominant market share and monopoly-like 92% gross margins on the annual support of its products.

Rimini Street Vehemently Denies Oracle's False Accusations

Rimini Street's business processes and procedures are entirely legal, and Rimini Street vehemently denies Oracle's accusations. Rimini Street has implemented extraordinary processes and procedures to assure the proper use of Oracle's intellectual property as detailed more fully in Rimini Street's response to Oracle's complaint. For example:

Each client authorizes Rimini Street to perform work on its behalf

Rimini Street only delivers Oracle software and support materials to each client who is entitled to receive such materials

Rimini Street uses separate data "silos" for each client and has policies against co-mingling data

Rimini Street is authorized by its clients to possess and use copies of their Oracle licensed products to provide services to them, just like IBM, AT&T, Accenture, CedarCrestone and virtually every other hosting service provider working with copies of their client's licensed products

Support Innovation, Better Value and Ultra Responsive Service

"Rimini Street looks forward to positively resolving its disputes with Oracle, and we remain focused on continuing to deliver award-winning, ultra-responsive service as always to our fast-growing client base who seeks a better software support value," said Seth Ravin, president and CEO, Rimini Street. "Rimini Street will also continue to aggressively innovate its service offering and expand its popular service to even more software product lines as we continue to execute against our business plan."

About Rimini Street, Inc.

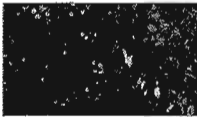
Rimini Street is the leading third-party provider of enterprise software support services. The company is redefining enterprise support services with an innovative, award-winning program that enables Siebel, PeopleSoft, JD Edwards, and SAP licensees to save at least 50% in annual support fees and save up to 90% in total support costs over a decade. Clients can remain on their current software release without any required upgrades or migrations through 2020 and beyond. Hundreds of Global, Fortune 500, midmarket, and public sector organizations from virtually all industries have selected Rimini Street as their trusted, software vendor independent support provider. To learn more, please visit <http://www.riministreet.com> or call within the USA (888) 870-9692 or internationally +1 (702) 839-9671.

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EXHIBIT B

DOCUMENT FILED UNDER SEAL

EXHIBIT C


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SOFTWARE / SERVICES March 29, 2010 9:00 AM

Rimini Street Files Countersuit Against Oracle

By Chris Kanaracus, IDG News Service [Print](#) [Digg](#) [Twitter](#) [Facebook](#) [More...](#)

Oracle on Monday was hit with a counterclaim by Rimini Street, the third-party software maintenance provider it sued in January over alleged intellectual property violations.

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Oracle's suit is groundless, anticompetitive and disparaging, Rimini Street said in the response filed Monday in U.S. District Court for the District of Nevada.

Rimini Street provides support for SAP and Oracle applications, pledging that customers will save at least 50 percent off their vendor-provided support bills. While third-party support means customers don't receive product upgrades, Rimini Street caters to companies with stable legacy systems and no immediate desire for updates.

Vendors fiercely covet annual software maintenance revenues, which are charged as a percentage of a customer's license fees and provide steady income even when new business is harder to find. "Software license updates and product support" accounted for 51 percent of Oracle's total revenue in its most recent quarter, generating US\$3.3 billion against just \$281 million in operating expenses, for a profit margin north of 90 percent.

Oracle's suit against Rimini Street followed a similar one it filed in 2007 against SAP and its former subsidiary, TomorrowNow, which also offered third-party support for Oracle applications. TomorrowNow workers illegally downloaded software from Oracle's support systems, according to Oracle. SAP has said the employees were authorized to download the materials on behalf of TomorrowNow customers, but also that some "inappropriate downloads" had occurred.

Rimini Street CEO Seth Ravin [was a founder of TomorrowNow. Oracle has alleged Rimini Street amounts to a redux of TomorrowNow's "corrupt" business model.

Rimini Street "typically logs on to Oracle's password protected Technical Support websites using a customer credential, then downloads Software and Support Materials in excess of the customer's authorization under its license agreement," according to Oracle's suit.

The company then uses automatic crawling tools to download Oracle materials "in intentional violation of Oracle's Technical Support website Terms of Use," the complaint states. "These intrusions have damaged Oracle's support services by causing the databases which host the Software and Support Materials to freeze, disrupting their operation and impeding the availability of lawful downloads to Oracle's other customers."

Rimini Street's answer and counterclaim denies wrongdoing on its part.

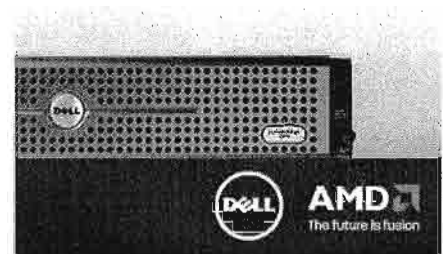
"Oracle had full knowledge that Rimini Street's actions were authorized by Oracle's customers," it states. "Far from acting as 'fraudulent thieves,' Rimini Street has acted legally, openly (and often with Oracle's full cooperation)." In addition, Oracle has been unresponsive to invitations to discuss Rimini's business practices or have them independently vetted, the filing alleges.

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Rimini Street also takes "extraordinary efforts ... to ensure that Oracle's intellectual property rights are respected," whereas Oracle has conducted a "systematic campaign" against Rimini, including a series of "hostile" letters, the filing states.

"Over the years, Rimini Street responded to each Oracle letter, explained the appropriateness of Rimini Street's practices and procedures, and repeatedly offered to meet and discuss any questions or concerns Oracle might have about Rimini Street's processes and procedures," it states.

Rimini admitted it has used automated downloading tools, but said they were necessary "because Oracle refused to help its customers identify and take delivery of such large volumes of materials."

In June 2007, Oracle changed the terms and conditions on its Web site, disallowing the use of such tools, according to Rimini Street. This action was anticompetitive and in violation of Oracle's customers' contractual rights, the filing states.

"Oracle's efforts escalated in December 2008 when Oracle began interfering with Rimini Street's performance of an authorized download for a large client switching from Oracle to Rimini Street support by blocking Rimini Street access to the Oracle support websites," it adds. Oracle relented after appeals from Rimini and the customer, according to the filing.

As "a good-faith attempt at conflict reduction," Rimini agreed to stop using automated download tools in January 2009, telling Oracle of its decision the following month.

Rimini Street also spoke with Oracle representatives in February 2009 and offered to share internal information with the vendor "and/or to work out an agreement that would utilize an independent third party auditor reporting back to both parties to confirm Rimini Street's compliance with its standard processes and procedures," the filing states.

Oracle did not respond to Rimini Street's proposals, and subsequently filed suit, it adds.

"Oracle has had unlimited opportunities over nearly five years to dialogue and work directly with Rimini Street ... but, as the facts demonstrate, that is not Oracle's objective. Instead, Oracle's goal is to forestall after-market product support competition," the filing states.

An Oracle spokeswoman declined to comment Monday.

Privately held Rimini Street says revenue grew 270 percent year-over-year in 2009, and that it now has nearly 300 clients, 160 employees and \$150 million in "sales backlog." In addition, it claims a 95 percent annual renewal rate.

In an interview, Ravin equated third-party software maintenance to independent oil change shops, saying the same rights consumers have to take their cars to places besides the original dealer apply to his own business.

Oracle's suit has put a slight damper on sales, according to Ravin.

"We continued to close business, including some of the largest deals ever," since the suit was filed, he said. "[But] I think we had a few deals that have not moved forward because of the litigation. We believe that's a good part of the intent of the suit, to slow our business down."

Rimini Street expects to spend "millions and millions of dollars" to pay its legal counsel in the case, he said. The company anticipated the suit and budgeted for the legal fees, which it considers "an investment we are making to finally put this issue to rest."

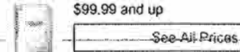
The case is "critical on so many counts," said Ray Wang, partner with analyst firm Altimeter Group.

"It's imperative that the rules of engagement for third-party maintenance be established," Wang said. "That's the big question in the room. People want it. How can you do it in a way that's respectful to Oracle's intellectual property rights and respectful to the customer's rights? Right now, the rules are just murky."

"If anything (comes) out of all this, hopefully there are some rules of engagement that are created," he added. "Right now customers are looking everywhere to cut costs."

If Rimini Street wins, the market for third-party maintenance will be a more welcome prospect to other providers, he said. But if it loses, Oracle may have "shut out or stopped people from thinking about this."

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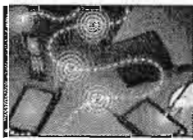
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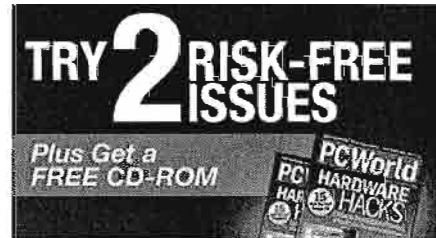
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December 3, 2008

VIA EMAIL

Jeffrey S. Ross
Legal Department
Oracle USA, Inc.
10 Van de Graaf Drive
Burlington, MA 01803

Re: Continued Business Interference and Anti-Competitive Practices

Dear Mr. Ross:

As you will recall, Snell & Wilmer L.L.P. represents Rimini Street, Inc. ("Rimini") as lead counsel for matters involving Oracle Corporation and its acquired entities.

In our June 28, 2007 letter, Rimini brought to Oracle's attention, amongst other issues, serious customer access and downloading impediments relating to Oracle's web portals required for use by Oracle's annual maintenance-paying PeopleSoft, JD Edwards, and Siebel licensees.

It does not appear that Oracle has taken any corrective actions to resolve the issues. In fact, Oracle has expanded the issues with its recent introduction of Oracle's new web portal <http://www.metalink3.oracle.com> ("MetaLink3/MyOracle Support") which denies Oracle's annual maintenance-paying clients the ability to reasonably identify, catalog, and take delivery of all available program updates, software updates, bug fixes, patches, custom solutions, and instructional documents ("Support Materials") for covered products.

Even accepting that Oracle may have an interest in protecting its intellectual property, the antitrust laws only permit a company to impose the least restrictive means to protect that property. The new MetaLink3/MyOracle Support web portal far exceeds the least restrictive means to achieving that interest. Even if the web portal was the least restrictive means, the antitrust laws would still bar Oracle's new web portal because Oracle's imposition of it after its customers and their agents have billions of dollars of sunk costs, if not more, into having access to the Support Materials.



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The antitrust laws further prohibit a company's pretextual use of intellectual property protection to bar competition. Accepting for argument sake that Oracle can otherwise engage in exclusionary conduct to protect legitimate intellectual property rights, the new web portal is facially and massively overbroad. In this light, Oracle's object of protecting intellectual property rights is not genuine and obviously pretextual. Moreover, as explained below, this object can be more simply *and more effectively* achieved without having the effect of excluding Oracle's customers from engaging in "self-support" and "self-performance" with respect to minor and major upgrades to other currently available software releases. Further, this change – after Oracle's customers have expended substantial sunk costs – is evidence of exclusionary effect and Oracle's anticompetitive intent. This evidence strongly supports antitrust claims based on either a tying or monopolization of an after-market theory.

Oracle maintenance-paying customers have collectively paid Oracle billions of dollars in annual support fees to obtain and be able to use all available "Support Materials," and Oracle has recently taken additional actions to make it potentially impossible for customers to ever obtain or be able to obtain by reasonable means all the Support Materials they have already paid for. Such actions might entitle customers to potentially substantial refunds, damages, and settlements for fraud, false and misleading advertising, or breach of contract claims. Further, Oracle may also be liable to thousands of PeopleSoft licensees for substantial claims related to the PeopleSoft Customer Assurance Program that are triggered by material reductions in support services.

We can only surmise that Oracle preventing annual maintenance-paying customers from being able to reasonably identify, catalog, and take delivery of all available Support Materials for which a customer has already paid substantial sums of money would, from Oracle's position, have a potentially negative impact on its total annual maintenance renewal rates, maintenance revenues, and consulting revenues. Oracle may view a customer's possession of all Support Materials as making it easier for customers to "self-support" their licenses and "self-perform" minor and major upgrades to other currently available software releases.

In addition to the foreclosure effect described above, Oracle's actions appear intended to intimidate Oracle customers from terminating Oracle annual maintenance services that are contractually optional and not required to be purchased by Oracle licensees as a condition of their software license; self-supporting licensed Oracle products; or pursuing the purchase of maintenance services from Rimini Street and/or other third party consultants. Thus, in addition to the antitrust claim arising from the foreclosure effect in the tied maintenance services market as well as a monopolization claim, Rimini Street and/or other third party consultants may have a common law tortious interference with contract and/or business expectancy claim.

Once again, and because of the overwhelming breadth and exclusionary effect of the new web portal, we are bringing this matter to your attention to afford Oracle another opportunity to promptly investigate and resolve the legal issues presented, mitigate potential accrued liabilities,



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and avoid future potential liabilities. Oracle has both the technological means and resources to assure annual maintenance-paying Oracle licensees can fully exploit their contractual rights while ensuring reasonable, adequate protection of Oracle's intellectual property.

Impediments to Oracle Annual Support Customers Seeking to Obtain From Oracle Materials for which They Paid

In consideration of Oracle Annual Support fees paid for listed licensed products, licensees have been and remain entitled to access to and rights to download and use all Support Materials for such licensed products from the start through the end of a pre-paid "Support Period." Oracle terms usually require pre-payment of annual support fees at time of annual contract renewal.

Issue #1: Annual Support Paying Clients Cannot Properly Identify Each and Every One of the Support Materials They Are Entitled to Obtain and Use

Although Oracle has full knowledge of the actual licensed products for each licensee and each annual maintenance renewal clearly indicates what licensed products are covered by the support fees, Oracle continues to choose not to utilize this information to help licensees identify all the Support Materials the maintenance-paying licensee is entitled to obtain and use under their Oracle licenses and the annual maintenance agreement.

Instead, Oracle continues to leave its entire intellectual property set available to each and every maintenance-paying licensee with a login and password, regardless of what Support Materials the maintenance-paying licensee is actually entitled to obtain and use. Oracle then claims that full license and intellectual property compliance is solely the responsibility of the maintenance-paying licensee. This is not reasonable or workable since (a) there have been many product name changes and recombination of features and products over the years that make it nearly impossible for a reasonable customer to be 100 percent sure of license compliance and match up to their license agreements; and (b) users of Oracle Support Services are the users of the software products and rarely have access to or have ever seen the legal license agreement which is usually filed away in the customer's legal department and therefore are not 100 percent sure of license compliance with their original license agreement.

Oracle has the technological means to resolve this license ambiguity issue to the benefit of all parties. As an example of one possible solution, Oracle can (a) tag each item on its web portal with metadata that clearly indicates what licensed product or product line is associated with each item, and (b) only display for viewing, selection, and download to the licensee and its representatives those Support Materials where the metadata tag matches the maintenance-paying client's licensed product list and where support fees have been paid for such licensed product.



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As Oracle is the world leader in manufacturing the very software products needed to implement this solution, taking steps (a) and (b) above would be reasonable steps by Oracle that would assure that its intellectual property is being protected by making sure that Oracle intellectual property is only being obtained by those maintenance-paying customers with a right to obtain particular and specific intellectual property that is licensed to them. Clients would immediately benefit by being able to search on Support Materials where the metadata indicates a link to a particular and specific licensed product where maintenance-fees have been paid.

Issue #2: Annual Support Paying Clients Cannot Obtain a Catalog of All Support Materials They Are Entitled to Obtain and Use

It remains impossible for a maintenance-paying client to self-identify and produce a full and complete catalog of the Support Materials a maintenance-paying licensee is entitled to obtain and use following payment of support fees, the sufficiency of which is agreed upon with Oracle's acceptance of fees. Oracle claims that it does not have the current technical capability of identifying and producing such a catalog based on each customer's own list of licensed products that are covered under a support agreement. Oracle also claims provision of the catalog is not a service they provide maintenance-paying customers on demand or at any time during their paid Support Period. Therefore, due solely as a result of intentional acts and decisions by Oracle, at this time, neither Oracle nor a maintenance-paying customer have (and never have had) the ability to determine with 100 percent accuracy the catalog of Support Materials that a maintenance-paying customer is entitled to obtain and use of a particular date and time.

Oracle's decision not to provide this catalog of Support Materials impacts (in a negative manner) the framework on which the above-mentioned legal claims are evaluated. Clearly, if Oracle elects to implement a metadata solution on all Support Material items, it could easily develop a search capability that could provide Oracle and licensees a 100 percent accurate catalog of the Support Materials a particular maintenance-paying customer is entitled to obtain and use. That is telling about the pretext that Oracle is undertaking here.

Issue #3: Annual Support Paying Clients Cannot Reasonably Obtain All Support Materials They Are Entitled to Obtain and Use

With Issues #1 and #2 above we have established that, due solely to Oracle's intentional acts and decisions, it is impossible today (and previously) for an Oracle maintenance-paying customer to determine with 100 percent certainty all Support Materials it is entitled to obtain and use from Oracle and for which they paid. Without the ability to determine 100 percent what Support Materials a maintenance-paying client is entitled to obtain and use and no active guidance from Oracle, Oracle leaves its maintenance-paying customers on their own to use their best reasonable efforts to identify and catalog the Support Materials each customer believes they may be entitled to obtain and use.



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A maintenance-paying customer with several products may be entitled to obtain and use tens of thousands or more Support Material items available on Oracle's web portal. Manually identifying which tens of thousands of items in a total of web portal pool of potentially millions of items would require professional labor time of potentially hundreds and thousands of hours. Such labor expenditures and timelines are so extensive and unreasonably burdensome as to assure any reasonable person would conclude that Oracle has, solely through its own intentional acts and decisions, made it virtually impossible to complete such a task manually.

Therefore, if a maintenance-paying customer wishes to attempt to use best efforts to identify, catalog, and obtain all Support Materials they are entitled to obtain and use, the only potential solutions are:

1. Develop and use automated tools to search the Oracle web portal and make educated, reasonable guesses as to which Support Materials most likely match with the Oracle maintenance-paying customer's licensed product set and then automatically download such items.
2. Oracle staff can search the Oracle web portal and make educated, reasonable guesses as to which Support Materials most likely match with the Oracle maintenance-paying customer's licensed product set and then deliver the entire set of Support Material electronically or on media.

However, not only does Oracle refuse or otherwise fail to deliver, upon request, all Support Materials for which its Oracle Support Services customers have contracted and paid to access, possess, and use within their license rights, but Oracle has recently attempted to ban the use of any automation tools to assist with the massive, burdensome projects. While Oracle has publicly cited "performance concerns" for their web portal as a result of the use of such tools as the reason for banning their usage, Oracle's letter of October 11, 2007 to Rimini Street clearly stated a different, more troubling explanation for the new policy that indicated the change was anticompetitive behavior.

Historically, maintenance-paying licensees and their contracted agents have had no choice but to resort to automation tools as the only feasible way to try and identify, catalog, and download such a large volume of Support Materials. Maintenance-paying clients who did not invest significant sums of money and technical time to develop such automation tools more than likely are entitled to obtain and use an incalculable number of Support Materials they paid for but have been unable to reasonably identify, obtain, and enjoy the benefits of their purchase.

Beginning in late November 2008, with the move of PeopleSoft, JD Edwards, and Siebel support to the MetaLink3/MyOracle Support web portal, Oracle has escalated its anticompetitive



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activities and has made it impossible for Oracle maintenance-paying customers to download any substantial amount of items from its new MetaLink3/MyOracle Support web site in a single login session. According to our experience and subsequently confirmed and documented by Oracle personnel, any attempt to access and download a substantial amount of Support Material items, without any regard to the verification of any actual rights of the customer to the Support Materials, will cause Oracle's network to immediately shutdown the valid login session and automatically block the initiator's valid IP address so that no additional or subsequent login requests are accepted from such IP address.

With Oracle's recent implementation of the ban on the use of automation tools designed to help with the massive, unreasonably costly, and time consuming project of identifying, cataloging, and downloading authorized Support Materials or even allowing long, manual sessions of downloading Support Materials, Oracle no longer provides any reasonable mechanism by which a licensee paying support fees to Oracle can physically obtain what it reasonably believes are all the Support Materials they have paid for and are entitled to obtain, possess, and use.

If Oracle implements and utilizes its own software products, it would be capable of matching the metadata of authorized Support Material items to the maintenance-paying customer's licensed product and supported product lists – assuring control and protection of its intellectual property.

If Oracle has chosen to use data volume measures and session timers to allegedly protect intellectual property, this is invalid. Such measures are completely useless in determining the extent of the intellectual property rights of the downloading party.

If Oracle has chosen to use data volume measures and session timers to allegedly protect its web user population from significant performance degradation, this is invalid. Oracle sells billions of dollars a year in annual maintenance with a ninety percent gross profit margin and claims to manufacture the heaviest-duty database products in the world capable of record performance under heavy loads. If Oracle's web portal performance is unreasonably slow under the heavy load of its customers trying to obtain all of their rightful Support Materials, then Oracle has the capabilities, resources and obligation to increase performance to levels that are acceptable and reasonable under all loads and user conditions.

Unfortunately, based on the information available and Oracle's past comments, it appears that Oracle is simply using such measures to effectively block maintenance-paying customers from identifying, cataloging, and obtaining all the Support Materials they have paid for and are entitled to use under their Oracle agreements.



Jeffrey S. Ross
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Until and unless Oracle agrees to indentify, catalog, and package-up on demand of the customer all Support Materials that it reasonably believes a maintenance-paying customer is entitled to obtain and use, Oracle should immediately (a) suspend its “no automation tools” rules, (b) remove session timeout and data volume cutoff thresholds, and (c) provide reasonable extended access for maintenance-paying customers to get all the Support Materials they should have been able to identify, catalog, and obtain while their Oracle maintenance contract was valid and in force.

Issue #4: “Only in Furtherance...” Website Use Term Designed as a Competitive Barrier

The revised Terms of Use on Oracle’s website state that a licensee’s “username and password are confidential information and may only be distributed to persons within [licensee’s] organization who have a legitimate business purpose for accessing the materials contained on this server in furtherance of [licensee’s] relationship with Oracle/PeopleSoft/JDEdwards.” To the extent Oracle interprets this language and seeks to enforce this provision in a way that prevents Oracle licensees from enabling their third party agents to access Support Materials on the Oracle customer support websites—on the licensees’ behalf and for the purpose of obtaining authorized content—such enforcement activities are clearly anticompetitive and tortious interference with contractual relationships as well as a myriad of claims belonging to the licensee. Moreover, any attempt by Oracle to redefine the terms and scope of a licensee’s access to and downloads of authorized Support Materials after that licensee’s decision to terminate Oracle Support Services, but during the valid, paid Support Period, would be nothing more than a scheme to deprive the licensee of the Support Materials for which it invested significant resources (to Oracle’s benefit).

Issue #5: Annual Support Paying Clients May Be Intimidated Away From Obtaining All Support Materials They Are Entitled to Obtain and Use Because of Support Portal Design and Oracle’s Attempt to Make License Compliance 100% Client Responsibility

Oracle’s company-wide policy of attempting to make license and intellectual property compliance 100 percent the sole responsibility of its licensees and customers is not reasonable and creates ambiguity with respect to license rights.

Because Oracle maintenance-paying clients must make educated, reasonable guesses about what Support Materials might be appropriately licensed to them without 100 percent certainty, many clients may be intimidated from trying to identify, catalog, and obtain the Support Materials they have paid for and are legally entitled to use to their benefit.



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It is anticompetitive to intimidate Oracle customers from terminating Oracle annual maintenance services, self-supporting licensed Oracle products, or pursuing the purchase of maintenance services from Rimini Street and/or other third party consultants.

Oracle's failure to take timely corrective action to resolve the above issues could lead to a further response from Rimini Street, government entities with jurisdiction, and/or Oracle's customers.

Sincerely,

SNELL & WILMER L.L.P.

A handwritten signature in black ink, appearing to read "Dan W. Goldfine", written over a circular stamp or seal.

Dan W. Goldfine

cc: Daniel Wall, Latham & Watkins (*via e-mail and facsimile*)
Board of Directors, Rimini Street, Inc. (*via e-mail*)

EXHIBIT E

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December 19, 2008

VIA FAX AND MAIL

Daniel Wall, Esq.
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, California 94111

Re: Continued Business Interference and Anti-Competitive Practices

Dear Dan:

This is a follow-up to Rimini Street, Inc.'s ("Rimini") December 3, 2008 letter and letters from 2007 as well as our recent discussions. In particular, on December 10, 2008, you and I discussed Rimini's allegations that Oracle Corporation ("Oracle") is engaging in wrongful conduct and whether Oracle's intent was to effectively block Oracle's licensees and their authorized agents from obtaining all the support materials that Oracle is contractually obligated to provide its licensees. These same licensees have paid significant fees to obtain and use such support materials.

You and I agreed that it might be in both parties' interests for you to confer with your client and clarify Oracle's intent.

You informed me that you anticipated that you would be able to get back to me by December 12, 2008. That did not occur. I attempted to reach you by phone and email during the week of December 15th, reaching you on December 17, 2008. You indicated that your client had not responded to your inquiries and that you would follow-up immediately. As of the date of this letter, you have not gotten back to me with Oracle's response to the allegations or my offer to try and amicably and quickly resolve the matter so all parties can return to conducting their business without disruption.

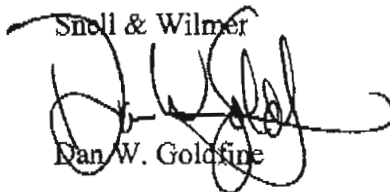
Given Rimini's continued offers of willingness to work cooperatively with Oracle for the benefit of their mutual clients, it could be reasonable to infer by the lack of response to the serious allegations that Oracle's intent is to purposely engage in the wrongful conduct identified in my December 3, 2008 letter.

Snell & Wilmer
LLP

Daniel Wall, Esq.
December 19, 2008
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The ramifications of Oracle's conduct are severe and immediate for Oracle licensees whose contract rights Oracle is violating, and Oracle's conduct has forced Rimini to head down a path that seems counterproductive to Oracle's overall business goals. If Rimini or I have misunderstood Oracle's intent in this matter, please commence remedial steps immediately and contact me so I can, if necessary, arrange a meeting and hopefully avoid having to take any additional steps to remedy Oracle's wrongful and illegal conduct.

Very truly yours,

Snell & Wilmer

Dan W. Goldfine

cc: Jeffrey S. Ross
Jennifer Gloss

9361864

EXHIBIT F

Daniel M. Wall
Direct Dial: (415) 395-8240
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December 23, 2008

VIA EMAIL

Dan W. Goldfine, Esq.
Snell & Wilmer LLP
One Arizona Center
Phoenix, AZ 85004-2202

Re: Oracle Corporation and Rimini Street, Inc.

Dear Dan:

I am following up on our telephone conversation on December 10, your letter to Jeff Ross dated December 3, 2008, and your subsequent letter to me. I have discussed the matter with Oracle and this is the company's response both to the letters and to your inquiry as to whether there is a "remedy" addressing Rimini Street's complaints that is acceptable to Oracle.

A remedy implies a problem, so let me state our understanding of the problem Rimini Street would like to have solved. From what you told me and what Rimini Street's Dennis Chiu wrote in his November 25 email to Oracle's John Marandola, it appears that Rimini Street has a business practice of downloading Oracle support materials that a new customer may need immediately prior to the time when the customer ends its support relationship with Oracle and commences Rimini Street support. As you explained this, the "problem" is that the customer will lose access to the Oracle support materials when it discontinues its support relationship with Oracle. Therefore, Rimini Street, ostensibly acting as the customer's agent, uses the customer's log-on credentials to download materials from Oracle for use after the support term ends. This is what your letter refers to as "the ability to reasonably identify, catalog, and take delivery of all available program updates, software updates, bug fixes, patches, custom solutions, and instructional documents ('Support Materials') for covered products."

We now know that, in violation of Oracle's Terms of Use, Rimini Street acquires Oracle Support Materials for its customers through automated means such as crawlers. This explains the mass downloading Rimini Street's undertakes—as I mentioned, information that has recently come to Oracle's attention suggests that Rimini Street is downloading tens of thousands of discrete Support Materials at a time. Rimini Street suggests these technological measures are necessary because Oracle has not created a better way for departing customers to quickly identify, gather and store what they want before the right to access the support site terminates (or expires).

Dan W. Goldfine, Esq.
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LATHAM & WATKINS LLP

The “problem” is actually that Oracle has recently been able to detect this downloading activity and block the IP addresses from which Oracle’s MetaLink3 web portal is being accessed. You acknowledged Rimini Street’s awareness during at least the last fourteen or fifteen months that Oracle’s “policy” has been not to allow this kind of mass downloading of Support Materials. However, you argued that Oracle’s “practice” was more lenient as evidenced by the fact that Rimini Street has been able to obtain those materials that it has sought. In other words, the “problem” is that Oracle is now effectively enforcing a policy that Rimini Street acknowledges has been in effect for a considerable amount of time.

This led to your letter of December 3. That letter reprises claims of anticompetitive behavior made a year-and-a-half ago and about which we have heard nothing for the thirteen months since Oracle responded to Rimini Street’s contentions. Under the circumstances it is clear that you have resurfaced those claims as a pretextual defense of the downloading activity that has recently come to light. If Rimini Street truly believed itself the victim of anticompetitive behavior by Oracle, we doubt it would have sat on Oracle’s letter for thirteen months. The real problem is not Rimini Street’s stale and unsupportable antitrust claims; it is that Rimini Street has now been caught doing exactly what Oracle sued SAP for doing.

At the root of this “problem” is Rimini Street’s contention that it may ignore Oracle’s Terms of Use prohibition on automated downloading from its support website, regardless of the consequences. We disagree. Oracle’s policy against the type of automated downloaded conducted by Rimini Street exists for two reasons.

First, Oracle’s value as a software company originates in large measure from its intellectual property, and the policy is necessary to protect this intellectual property. Automated downloading of the type done by Rimini Street invariably results in downloaded copyrighted support materials not licensed to the customers whose credentials are being used to take them. This is what Rimini Street has apparently done through its automated downloading. Oracle has preliminarily identified thousands of files taken from Oracle’s systems by Rimini Street, using XO Communications’ credentials, which neither Rimini Street nor XO Communications have any license to or right to have. This is illegal—customers must pay for the support materials they take from Oracle.

Oracle does not agree that mass downloading through the use of crawlers is justified because departing Oracle support customers have no convenient way to harvest licensed materials only. The fact that Oracle provides an array of support materials to its support customers does not create or imply a duty to facilitate a practice of mass downloading that has utility only for those who intend to end their Oracle support relationship. The typical Oracle support customer never has the “problem” you have identified—that is, a need to copy all support materials to which they might be entitled at one time. The typical Oracle support customer knows what it needs, and what it has paid for, and it downloads particular support materials using normal means over time. Oracle establishes its support infrastructure for those customers and the normal business practice, and that is sufficient. Oracle is not required to enable any kind of mass downloading program and Rimini Street’s conduct does not become justified because Oracle has not done that.

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Moreover, based on its experience, Oracle is skeptical that Rimini Street has used a crawler to harvest thousands of unlicensed support materials from Oracle by “accident” or because it cannot identify the right files. Rimini Street operates a competitive business serving many customers that may have use for the support materials copied in this unlawful manner. As the SAP/TomorrowNow case illustrates, Oracle has no assurance that a third party support provider will download materials solely for the benefit of a customer that might have a license to use them. It is entirely reasonable for Oracle to anticipate and guard against the possibility that a competitor will store and use these materials for the benefit of all of its customers and its overall business without regard to the license rights of particular customers. For example, Oracle is deeply concerned that the library Rimini Street apparently has compiled for the ostensible benefit of XO Communications, which includes material relating to an entire product family not licensed to or in use by XO Communications, has been or will be used to support other customers in violation of Oracle’s copyrights and the licenses under which each of Oracle’s customers operates. This is similar to what Oracle has seen in the case of SAP/TomorrowNow, and it certainly has not escaped Oracle’s notice that Mr. Ravin, the founder of Rimini Street, was also a founder of TomorrowNow.

Second, Oracle’s policy is designed to preserve the operational integrity and functionality of Oracle’s support systems. Automated downloading of the type Rimini Street has engaged in can interfere with the ability of other customers to download materials from Oracle’s systems, and also prevents Oracle from using the system for its intended purpose.

In sum, there is no justification for *Rimini Street’s* use of crawlers and similar technologies to download Oracle Support Materials *en masse* without apparent regard for whether the customer is licensed to the materials or not. There is no other apparent justification for this activity except that Rimini is stockpiling these materials for other, illicit uses. A competitively motivated program of accessing Oracle’s support web portals and downloading Oracle’s intellectual property lacks any justification and is unlawful on numerous grounds including the Computer Fraud and Abuse Act and the computer trespass (or trespass to chattels) doctrine. Rimini Street knows full well how seriously Oracle takes that practice, having followed and publicly commented on Oracle’s ongoing litigation against SAP. There is no merit to any argument that an Oracle customer may authorize Rimini Street to engage in this plainly illegal activity.

The direct answer to your question as to whether Oracle will remedy Rimini Street’s current problem is “no.” Oracle will not facilitate what it regards as unauthorized, unlicensed and unlawful access to, and copying of, its intellectual property assets. Further, these revelations about Rimini Street’s business practices require Oracle to demand that Rimini Street cease from any further automated downloading of Oracle Support Materials and subject itself to an audit to determine which materials it lawfully obtained and may continue to have and use in support of licensed customers, and then promptly to return all other Oracle Support Materials it may have in its possession. Oracle will also need to fully understand any and all instances in which Rimini Street may have used materials downloaded for one customer to support another customer. If Rimini Street contends that it has never used any Oracle intellectual property, whether a download or some or all of any Oracle software environment, to support a different customer, please provide the requisite proof. Otherwise, Rimini Street’s copying and/or use of those

Dan W. Goldfine, Esq.
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materials infringes on Oracle's copyrights, and other intellectual property rights, and is an invasion of its computer systems contrary to CAFA and other relevant laws. Oracle also demands and expects that Rimini Street will immediately take all necessary measures to preserve all documents, electronic records, and Support Materials that relate or bear witness to the access to and downloading of Oracle Support Materials that has occurred thus far.

I understand, of course, that this is not the answer you were looking for. I cannot stress enough how seriously Oracle takes these issues, however. Rimini Street has no right to access, acquire, maintain possession of and use Oracle Support Materials not licensed by Rimini Street customers and that were created and licensed for the benefit of ongoing Oracle support customers, or to harvest these Oracle Support Materials through these electronic intrusions into Oracle's support infrastructure. I need to hear back from you by January 5, 2009, on whether Rimini Street will agree to cease these practices, allow the audit we have requested, and return any improperly downloaded Oracle Support Materials or other improperly obtained Oracle intellectual property as are in its possession.

Very truly yours,

A handwritten signature in black ink, appearing to read "Daniel M. Wall". The signature is fluid and cursive, with the first name "Daniel" and last name "Wall" clearly distinguishable.

Daniel M. Wall
of LATHAM & WATKINS LLP

cc: Jeffrey S. Ross, Esq.

EXHIBIT G

DOCUMENT FILED UNDER SEAL

EXHIBIT H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORACLE CORPORATION, et al.,

Plaintiffs,

No. C 07-1658 PJH

v.

**ORDER RE MOTIONS FOR
PARTIAL SUMMARY JUDGMENT**

SAP AG, et al.,

Defendants.

The parties' motions for partial summary judgment came on for hearing before this court on May 5, 2010. Plaintiffs appeared by their counsel Geoffrey Howard, Donn Pickett, Chad Russell, Holly House, Amy Donnelly, Zachary Alinder, and John Polito. Defendants appeared by their counsel Tharan Gregory Lanier, Elaine Wallace, and Jane Froyd. Having read the parties' papers and carefully considered their arguments, and the relevant legal authority, the court hereby GRANTS the motions in part and DENIES them in part.

BACKGROUND

Plaintiffs in this action are Oracle USA, Inc. ("Oracle USA"¹); Oracle International Corporation ("OIC"); Oracle EMEA Ltd. ("OEMEA"); and Siebel Systems, Inc. ("Siebel") (collectively, "Oracle" or "plaintiffs"). Oracle USA is the successor to PeopleSoft USA, Inc. ("PeopleSoft") and the successor in interest to certain PeopleSoft, J.D. Edwards ("JDE"), and Siebel entities. Plaintiffs allege that intellectual property rights formerly held by PeopleSoft, JDE, and Siebel entities were transferred to OIC as part of the acquisition of PeopleSoft and Siebel by Oracle; and that OEMEA is also the successor in interest to certain PeopleSoft and JDE entities.

¹ Oracle USA is now known as Oracle America, Inc.

1 Defendants are SAP AG ("SAP AG"); SAP America, Inc. ("SAP America"); and
2 TomorrowNow, Inc. ("SAP TN") (collectively "SAP" or "defendants"). SAP America is a
3 wholly-owned subsidiary of SAP AG, and SAP TN is a wholly-owned subsidiary of SAP
4 America.

5 The fourth amended complaint assert ten causes of action against the three
6 defendants: (1) copyright infringement, alleged by OIC; (2) violations of the Computer
7 Fraud and Abuse Act ("CFAA"), 18 U.S.C. §§ 1030(a)(2)(C), 1030(a)(4), & 1030(a)(5)(A),
8 alleged by Oracle USA and OIC; (3) violations of the California Data Access and Fraud Act
9 ("CDAFA"), Cal. Penal Code § 502(c)(7), alleged by Oracle USA and OIC; (4) breach of
10 contract, alleged by Oracle USA; (5) intentional interference with prospective economic
11 advantage, alleged by Oracle USA, OIC, and OEMEA; (6) negligent interference with
12 prospective economic advantage, alleged by Oracle USA, OIC, and OEMEA; (7) unfair
13 competition, under Cal. Bus. & Prof. Code § 17200 ("UCL"), alleged by Oracle USA, OIC,
14 OEMEA, and Siebel; (8) trespass to chattels, alleged by Oracle USA; (9) unjust enrichment
15 and restitution, alleged by Oracle USA, OIC, OEMEA, and Siebel; and (10) entitlement to
16 an accounting, alleged by Oracle USA, OIC, OEMEA, and Siebel.

17 On March 3, 2010, each side filed a motion for partial summary judgment. Plaintiffs
18 sought a ruling that SAP TN directly infringed OIC's copyrights;² that SAP AG and SAP
19 America are liable for vicarious and contributory infringement; and that SAP TN violated the
20 CFAA and the CDAFA. Defendants sought a ruling that OEMEA's California claims should
21 be dismissed; that plaintiffs could not recover damages incurred by related non-parties; that
22 "saved development costs" are an impermissible measure of damages; and that plaintiffs
23 could not recover under claims for which they did not disclose damage calculations.

24
25 _____
26 ² Plaintiffs seek summary judgment as to infringement of six of the approximately 120
27 copyright registrations at issue. The six registrations are HRMS 7.0 (TX 4-792-577), HRMS
28 7.5 (TX 4-792-575), HRMS 8, Service Pack 1 ("HRMS 8 SP1") (TX 5-501-312), Database 8.1.6
(TX 5-222-106), Database 9i, Release.2 ("9.2") (TX 5-673-282), and Database 10g, Release.2
("10.2") (TX 6-942-003). The HRMS software is used to run business payrolls and to automate
various complex processes, and the Database software stores and organizes business data
used by HRMS and other business application software.

1 In their opposition to plaintiffs' motion, defendants conceded SAP TN's liability for
2 direct infringement of the three PeopleSoft (HRMS) registrations for the period beginning
3 March 1, 2005, and the three Oracle Database registrations with no time limitation; as well
4 as SAP AG's and SAP America's vicarious liability for infringement of the six registrations
5 over the same time period. Defendants also conceded SAP TN's liability for violations of
6 CFAA § 1030(a)(2)(C) and CDAFA.

7 On August 5, 2010, the parties filed their trial briefs and the joint pretrial statement.
8 Based on those filings, the court requested that the parties submit a joint statement
9 clarifying which, if any, of the issues disputed in the motions for partial summary judgment
10 had been resolved and need not be addressed by the court.

11 In response, the parties filed a statement indicating that they had met and conferred,
12 and that they agreed that plaintiffs were entitled to summary judgment as to the issues of
13 direct copyright infringement of the six registrations by SAP TN, as indicated above;
14 vicarious copyright infringement of the six registrations by SAP AG and SAP America;
15 direct liability of SAP TN for violations of CFAA § 1030(a)(2)(C); and direct liability of SAP
16 TN for violations of CDAFA.

17 The parties agreed that certain other issues were ripe for decision – the contributory
18 copyright infringement of the six registrations by SAP AG and SAP America; the indirect
19 liability of SAP AG and SAP America for CFAA and CDAFA violations; the availability of
20 “saved costs” as a measure of damages in this case; the availability of lost profits of related
21 non-party entities in this case; and the limitation of damages under CDAFA, if at all, to no
22 more than plaintiffs' alleged “investigation costs.”

23 Finally, the parties were unable to reach agreement as to whether defendants'
24 concessions had mooted the following issues: the direct liability of SAP TN for violations of
25 CFAA § 1030(a)(5)(A)(i)-(iii); the availability of damages for trespass to chattels and
26 CDAFA claims; the dismissal of OEMEA's claims; and the dismissal of the pre-March 1,
27 2005 copyright infringement claims for the PeopleSoft/JDE registrations based on lack of
28 standing.

DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are those that might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Southern Calif. Gas. Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003). The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. See Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-25. If the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in order to defeat the motion. See Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 250.

B. Plaintiffs' Motion

1. SAP TN's Liability for Direct Infringement

To prove a claim of direct copyright infringement, a plaintiff must show that he owns the copyright and that the defendant himself violated one or more of the plaintiff's exclusive rights under the Copyright Act. See 17 U.S.C. § 501(a); Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004). Only a “legal or beneficial owner of an exclusive right under a

1 copyright is entitled . . . to institute an action for any infringement of that right while he or
2 she is the owner of it.” 17 U.S.C. § 501(b); see also Sybersound Records, Inc. v. UAV
3 Corp., 517 F.3d 1137, 1144 (9th Cir. 2008); Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d
4 881, 884-85 (9th Cir. 2005).

5 The parties dispute whether OIC qualifies as the owner of the three HRMS
6 copyrights at issue during the pre-March 1, 2005 period. The evidence provided by
7 plaintiffs shows that PeopleSoft obtained valid registrations for the three copyrights within
8 five years of publication. On March 1, 2005, PeopleSoft and the various JDE entities
9 merged into Oracle Systems Corporation (“OSC”), with OSC surviving the merger. The
10 merger agreements were recorded with the Delaware Secretary of State as of that same
11 date. The evidence shows further that on March 1, 2005, the PeopleSoft registrations were
12 transferred to OIC. The PeopleSoft/JDE/OIC asset transfer agreement was recorded in the
13 Copyright Office on August 12, 2008.

14 On July 10, 2009, pursuant to an “IP Rights Transfer Clarification Agreement,” OSC
15 transferred to OIC all of its rights to sue for past infringement of the transferred copyrights.
16 This agreement states that “at the time of the transfer of the PeopleSoft/JDE Assets and
17 the JDE IP Assets to OIC [March 1, 2005], the parties intended that all of the IP Rights (as
18 defined herein) be transferred to OIC, effective as of the Effective Date[.]” The “IP Rights”
19 include “all rights to sue for or otherwise enforce past, present, and future infringement
20 claims with respect to the IP Assets . . .”

21 In their opposition and “cross-motion,” defendants argue that OIC does not have
22 standing to sue for pre-March 1, 2005 infringement of any PeopleSoft/JDE copyrights,
23 because prior to that date, OIC did not own the registrations. Thus, defendants assert, OIC
24 may sue for pre-March 1, 2005 infringement only if it received a valid transfer of the right to
25 pursue those claims at the time of the mergers.

26 The general rule is that a general transfer or assignment of “exclusive rights” does
27 not convey accrued causes of action, because the right to sue for an accrued claim is not
28 an exclusive right under § 106 of the Copyright Act. Silvers, 402 F.3d at 884. Such

1 preexisting causes of action must be expressly included in the assignment or transfer.
2 ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2nd Cir. 1991); Co-
3 opportunities, Inc. v. National Broadcasting Co., Inc., 510 F.Supp. 43, 46-47 (N.D. Cal.
4 1981).

5 However, accrued claims may also be transferred, either in the assignment/transfer
6 agreement itself, or in a separate agreement, Co-opportunities, 510 F.Supp. at 46-48, and
7 the weight of authority holds that a document executed subsequent to the transfer may
8 effectively convey to the transferee the right to sue for infringements occurring prior to the
9 transfer, even where the subsequent assignment of the right to sue was executed after the
10 commencement of litigation by the transferee. See, e.g., Wade Williams Distribution, Inc.
11 v. American Broadcasting Co., Inc., 2005 WL 774275 at *3-4 (S.D.N.Y., Apr. 5, 2005);
12 Intimo, Inc. v. Briefly Stated, Inc., 948 F.Supp. 315, 317-19 (S.D.N.Y. 1996); Infodeck, Inc.
13 v. Meredith-Webb Printing Co., Inc., 830 F.Supp. 614, 620 (N.D. Ga. 1993); Co-
14 opportunities, 510 F.Supp. at 46-47; see also 2 Patry on Copyright (2010) § 5:113 (and
15 cases cited therein).

16 The Ninth Circuit provides no clear guidance on this issue. In Intimo, a case that
17 has been cited for this point by a number of courts, the original owner of the copyrights
18 assigned them to the plaintiff six months before the plaintiff filed suit for copyright
19 infringement that was alleged to have occurred both before and after the assignment. A
20 year after the complaint was filed, the plaintiff submitted an amended assignment, which
21 stated that the intent of the original owner when it assigned its copyright was also to assign
22 its cause of action to the plaintiff. The court found that the amended assignment was
23 effective and that the plaintiff had standing to sue for infringement that allegedly occurred
24 before the first assignment. Intimo, 948 F.Supp. at 318-19. The court concluded that “an
25 assignment of interest should be recognized provided the assignment occurs before trial,
26 the plaintiff is the real party in interest in at least one other claim, and the defendant suffers
27 no prejudiced from its recognition. Id. at 318.

28 Here, in line with the above-described analysis, the court notes that the assignment

1 of the right to sue for past infringement was executed on July 10, 2009, more than a year
2 before the scheduled trial date. In addition, there appears to be no dispute that OIC is the
3 real party in interest with regard to the infringements that occurred after the March 1, 2005
4 merger and transfer of copyrights. Finally, although defendants have not addressed this
5 particular issue from this perspective, the court sees no prejudice to defendants, in view of
6 the facts that the parties have conducted discovery on the substantive issues in this case,
7 discovery has closed, and the assignment will not change the issues to be litigated at trial.

8 Accordingly, defendants' cross-motion for summary judgment of non-infringement
9 based on pre-March 1, 2005 conduct with regard to the PeopleSoft/JDE registrations at
10 issue is DENIED. In addition, however, because it is not clear to the court that OIC has
11 established infringement during the pre-March 1, 2005 period, and because defendants'
12 concession with regard to the claim of direct infringement by SAP TN appears to have been
13 limited to the post-March 1, 2005 period, plaintiffs' motion for summary judgment as to any
14 such pre-March 1, 2005 infringement claims is DENIED. Based on defendants'
15 concessions, the motion is GRANTED as to plaintiffs' claim of direct infringement of the
16 three HRMS registrations by SAP TN post-March 1, 2005, and as to the three Database
17 registrations by SAP TN without time limitation.

18 2. SAP AG's and SAP America's Liability for Contributory Infringement

19 Plaintiffs argue that SAP AG and SAP America are liable for vicarious and
20 contributory infringement of OIC's copyrights. A defendant may be liable as a contributory
21 copyright infringer if he "with knowledge of the infringing activity, induces, causes or
22 materially contributes to the infringing conduct of another." Ellison, 357 F.3d at 1076
23 (citation and quotation omitted). The Ninth Circuit interprets the knowledge requirement for
24 contributory copyright infringement to include both those with actual knowledge and those
25 who have reason to know of direct infringement. Id.; see also Fonovisa, Inc. v. Cherry
26 Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (contributory infringement "imposes liability
27 where one person knowingly contributes to the infringing conduct of another").

28 Plaintiffs contend that SAP AG and SAP America knew about SAP TN's copying of

1 Oracle's software, even before SAP acquired TomorrowNow, and that SAP AG and SAP
2 America also knew about SAP TN's use of the database software. Plaintiffs assert that
3 SAP AG and SAP America exercised control over SAP TN following SAP's acquisition of
4 Tomorrow Now, which SAP announced on January 19, 2005. Finally, plaintiffs claim that
5 SAP AG admitted it enjoyed significant financial and strategic benefits from SAP TN's
6 allegedly illegal business model.

7 In response, defendants argue that plaintiffs' motion should be denied because they
8 have no evidence that SAP AG or SAP America took any specific, affirmative steps that
9 actively contributed to infringement. Defendants assert that one cannot induce, cause, or
10 materially contribute to infringement through mere inaction. It is this, according to
11 defendants, that distinguishes "contributory" liability from "vicarious" liability.

12 The court finds that the motion must be DENIED. While mere knowledge of
13 infringing conduct is insufficient to show contributory infringement, inaction can in some
14 cases constitute material contribution. See, e.g., Ellison, 375 F.3d at 1076-78. Here, the
15 court finds that triable issues exist with regard to the extent of SAP AG's and SAP
16 America's knowledge of the alleged infringement; with regard to whether SAP AG or SAP
17 America induced, caused, or materially contributed to the alleged infringement; and also
18 with regard to the extent of any actual involvement by SAP AG or SAP America in any
19 copying that was performed by SAP TN.

20 3. SAP TN's Liability for Violation of the CFAA

21 Plaintiffs argue that SAP TN violated the CFAA, 18 U.S.C. §§ 1030(a)(2)(C) and
22 1030(a)(5)(A)(i)-(iii).

23 Subsection (a)(2) of CFAA § 1030 provides that whoever

24 (a)(2) intentionally accesses a computer without authorization or exceeds
25 authorized access, and thereby obtains –

26 (A) information contained in a financial record of a financial institution,
27 or of a card issuer as defined in section 1602(n) of title 15, or contained in a
28 file of a consumer reporting agency on a consumer, as such terms are
defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer if the conduct involved an interstate or foreign communication . . .

shall be punished as provided in subsection (c) of this section.

18 U.S.C. § 1030(a)(2) (2007) (emphasis added).

Subsection (a)(5)(A) of CFAA § 1030 provides that whoever

(a)(5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; . . .

shall be punished as provided in subsection (c) of this section.

18 U.S.C. § 1030(a)(5)(A) (2007) (emphasis added).³

As indicated above, defendants have conceded that SAP TN violated CFAA § 1030(a)(2)(C). Thus, the only issue for decision as to SAP TN's liability under CFAA is with regard to § 1030(a)(5)(A)(i)-(iii).

In order to establish a violation of subsection (i), plaintiffs must show that SAP TN "knowingly cause[d] the transmission of a program, information, code, or command." Plaintiffs argue that SAP TN was fully aware of its illegal Titan and post-MED downloading and the resulting harm to Oracle. Similarly, with regard to all three subsections, plaintiffs must show that SAP TN caused "damage" to Oracle, and for subsection (ii), acted "recklessly."

Plaintiffs claim that the evidence shows at least three different types of damage from SAP TN's illegal downloading – the downloading took so much bandwidth that it impaired the ability of customers to separately log in to Oracle's system; the same downloading also skewed customer support data that Oracle uses to improve its customer support experience, making that data useless for its intended purpose; and the access and use of

³ CFAA § 1030 was amended in 2008, and it is the former version (in effect from 2001 until the 2008 amendments) that is referenced here. The 2008 version eliminated subsections (i), (ii), and (iii) as part of (a)(5).

1 Oracle's confidential support materials, including the use of scrapers to access internal
2 Oracle files, for use in competition with Oracle and in violation of the Terms of Use, also
3 impaired the integrity and confidentiality of that data.

4 In opposition, defendants contend that plaintiffs are not entitled to summary
5 judgment on these claims because there is no evidence that their computers suffered
6 "damage," and there is no evidence of any "intent to damage."

7 First, defendants assert that a showing of "damage" requires more than a showing
8 that a defendant copied data from a plaintiff's website – rather, a plaintiff must establish
9 that the defendant's activities impaired the "integrity" or the "availability" of the defendant's
10 data or systems, such that existing data was corrupted or delayed, or the servers crashed.

11 Here, defendants contend, there is no evidence that SAP TN's downloading caused
12 "damage" to plaintiffs' servers. They argue that plaintiffs' claim that SAP TN's use of Titan
13 impaired Oracle's customers' ability to log onto Oracle's customer support websites relies
14 entirely on speculation about what might have happened. They also contend that "skewed
15 customer feedback" is not cognizable "damage."

16 Defendants argue further that "impairment" to the confidentiality of plaintiffs'
17 materials is not cognizable "damage." They note that "accessing" and "using" confidential
18 information on plaintiffs' support websites does not result in "damage" under the CFAA,
19 because it does not result in the corruption or deletion of existing data – which is what
20 defendants assert is typically required to show "damage" under the CFAA. They argue that
21 mere copying does not constitute "damage" because it does not "impair" data.

22 Similarly, defendants argue, plaintiffs have failed to demonstrate that defendants
23 acted with an "intent to damage" Oracle's computers. They argue that simply asserting that
24 the downloading or access was intentional is not sufficient – plaintiffs must allege and
25 prove that SAP TN specifically "intended" to "cause damage." In the absence of this proof,
26 defendants argue, plaintiffs' motion as to the (a)(5)(A)(i) claim should be denied.

27 The court finds that the existence of triable issues precludes summary judgment,
28 and that the motion must therefore be DENIED. For example, the evidence is inconclusive

1 as to whether the alleged copying constitutes "impairment to the integrity or availability of
2 data, a program, a system, or information" that caused a loss aggregating at least \$5000 in
3 value during a one-year period. 18 U.S.C. § 1030(e)(8).

4 The evidence presented does not clearly establish that SAP TN's copying of
5 plaintiffs' files caused any slowdowns, disruptions in service, crashes, or other impairments
6 to the availability or accessibility of the systems or data; that SAP TN's access or
7 downloading activities ever changed, altered, deleted, or destroyed any data, programs,
8 systems, or other information on Oracle's customer support websites, or resulted in any
9 other type of damage to the computer system or data; or that Oracle's systems were
10 compromised as a result of SAP TN's activities.

11 Similarly, the evidence is inconclusive as to whether any "damage" was "intentional."
12 Undoubtedly any copying of plaintiffs' files was deliberate; it is not clear, however, whether
13 in copying the files, SAP TN intended to cause "damage."

14 d. Indirect Liability of SAP AG and SAP America for CFAA/CDAFA
15 violations

16 Plaintiffs argue that under the law of agency, SAP AG and SAP America are just as
17 liable for the CFAA violations as SAP TN, because of the nature and extent of the control
18 exercised over SAP TN by SAP AG and SAP America.

19 Plaintiffs contend that SAP AG and SAP America admit that they had control of SAP
20 TN's management, and that through SAP TN, they assumed complete responsibility for
21 maintenance, service, and support of Oracle's applications, which included the
22 downloading referenced above. Plaintiffs assert that SAP TN admits that its downloading
23 from Oracle's website was an "urgent step" in providing its service offering – according to
24 plaintiffs, the very offering for which SAP AG and SAP America marketed SAP TN in an
25 effort to win Oracle's customers.

26 To prove a violation of § 1030(a)(2)(C), plaintiffs must show that SAP AG and/or
27 SAP America accessed a "protected computer," that the access was done "intentionally,"
28 that the access was "without authorization" or "exceeded authorized access," that SAP TN

thereby obtained information, and that there was resulting damage to plaintiffs aggregating at least \$5000 in a one-year period. See 18 U.S.C. §§ 1030(a)(2)(C), 1030(a)(5)(b)(1), 1030(g)).⁴

Under CFAA § 1030(e) (definitions), the term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

and the term “protected computer” means

a computer –

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

18 U.S.C. § 1030(e)(1), (e)(2) (2007).

Defendants argue that SAP AG and SAP America are not indirectly liable under the CFAA or CDAFA for SAP TN’s allegedly wrongful conduct. First, with regard to CFAA, defendants contend that contrary to plaintiffs’ position, broad agency principles do not trigger liability under CFAA’s civil remedy provision. They argue that CFAA imposes liability only where a defendant has actually directed the wrongful acts.

The CFAA was enacted as a criminal statute in 1984 to “enhance the government’s ability to prosecute computer crimes.” LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1130 (9th Cir. 2009). In 1994, a provision was added allowing the filing of a civil action:

Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory

⁴ In a footnote, plaintiffs assert that the evidence of CFAA violations presented in their motion also meets the elements of CDAFA, and that summary judgment is therefore appropriate on that claim as well.

1 damages and injunctive relief or other equitable relief. A civil action for a
2 violation of this section may be brought only if the conduct involves 1 of the
factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). . . .

3 18 U.S.C. § 1030(g) (2007). The factors set forth in § 1030(a)(5)(B)(i)-(v) are

4 (i) loss to 1 or more persons during any 1-year period (and, for purposes of
5 an investigation, prosecution, or other proceeding brought by the United
States only, loss resulting from a related course of conduct affecting 1 or
6 more other protected computers) aggregating at least \$5,000 in value;

7 (ii) the modification or impairment, or potential modification or impairment, of
the medical examination, diagnosis, treatment, or care of 1 or more
8 individuals;

9 (iii) physical injury to any person;

10 (iv) a threat to public health or safety; or

11 (v) damage affecting a computer system used by or for a government entity in
furtherance of the administration of justice, national defense, or national
12 security....

13 18 U.S.C. § 1030(a)(5)(B).

14 By its terms, therefore, subsection (g) provides a civil remedy “against the violator.”

15 Defendants assert that “the violator” is the person who violated the statute with the
16 requisite criminal intent, and that the CFAA does not provide a cause of action against
17 individuals who fail to supervise violators, fail to train them properly, or conspire to cover up
their conduct.

18 Defendants argue that given the plain language of § 1030(g) and the predominately
19 criminal nature of the statute, courts have expressly limited the scope of civil liability, and
20 have imposed indirect liability on defendants only where it was clear that they directed the
21 allegedly wrongful acts. Defendants argue in addition that even if agency-liability principles
22 were applicable, the appropriate standard would be based on federal common law agency
23 rules, not on the state law agency rules cited by plaintiffs. Under federal common law
24 agency rules, a plaintiff seeking to demonstrate parent-subsidiary agency liability must
25 show a manifestation by the principal that the agent shall act for him; that the agent has
26 accepted the undertaking; and that there is an understanding between the parties that the
27 principal is to be in charge of the undertaking. See Restatement (Third) of Agency, § 2.03
28

(2006); see also Bowato v. Chevron Texaco Corp., 312 F.Supp. 2d 1229, 1239-40 (N.D. Cal. 2004) (plaintiff “must” establish these elements).

Here, defendants argue, plaintiffs have pointed to no evidence in the record showing that SAP AG and SAP America directed SAP TN to take any of the improper actions. They note that plaintiffs claim that SAP TN violated the CFAA by accessing Oracle customer support websites to develop and test Titan, after a customer’s maintenance end date. To hold SAP AG and SAP America liable, defendants argue, plaintiffs must show that they “directed” SAP TN to access Oracle’s support system.

Defendants contend that plaintiffs have pointed to SAP AG’s and SAP America’s control over SAP TN’s support activities – but have not shown that SAP AG or SAP America “directed” any particular wrongful action, much less the particular alleged acts. In addition, they assert, it is irrelevant that access-related issues were “discussed” with SAP AG or SAP America, or that they “continued to allow” this access, as plaintiffs argue. Defendants assert that the CFAA imposes liability only for committing CFAA violations, or for directing such violations – it does not create a duty to prevent CFAA violations.

Moreover, defendants contend, SAP AG’s and SAP America’s ability to issue directives – as evidenced by the directive that SAP TN remove software copies from its computers – does not establish that SAP AG or SAP America actually directed SAP TN’s alleged improper access in the first place. Finally, they assert that it makes no difference that SAP TN’s downloading activities may have been an “urgent step” in its service offering, because plaintiffs cite no evidence showing that SAP AG or SAP America directed SAP TN to take that “step.”

With regard to the CDAFA claim, defendants argue that plaintiffs’ motion cannot reasonably be considered a motion for summary judgment under the CDAFA. They note that plaintiffs’ motion exclusively addresses SAP TN’s alleged liability under the CFAA, referencing direct liability under the CDAFA only in a footnote; and that with regard to the claim of indirect liability as to SAP AG and SAP America, plaintiffs do not even go so far as to include it in the footnote.

1 Moreover, defendants argue, as with the CFAA, the criminal nature of the CDAFA
2 statute and the text of its civil remedy provision indicate that indirect liability should apply
3 only where there is evidence that the defendant "directed" the alleged unlawful action
4 (comparing Cal. Penal Code § 502(e)(1) with 18 U.S.C. § 1030(g)). They assert that even
5 if state law agency principles applied in the context of the state-law CDAFA claim, summary
6 judgment would still be inappropriate because California law considers agency to be a
7 question of fact that should not typically be decided on summary judgment.

8 The court finds that the existence of triable issues precludes summary judgment,
9 and that the motion for summary judgment as to SAP AG's and SAP America's indirect
10 liability under CFAA (or, to the extent that plaintiffs also seek summary judgment as to the
11 CDAFA claim) must therefore be DENIED. Because the CFAA has both criminal and
12 noncriminal applications, the court finds that the statute should be construed narrowly, as
13 opposed to broadly. See, e.g., LVRC Holdings, 581 F.3d at 1134-35 (where a statute has
14 both criminal and noncriminal applications, courts should interpret the statute consistently
15 in both contexts; ambiguity concerning ambit of criminal statutes should be resolved in
16 favor of lenity) (quotations and citations omitted); see also Shamrock Foods Co. v. Gast,
17 535 F.Supp. 2d 962, 966-67 (D.Ariz. 2008).

18 As an initial matter, plaintiffs have not established that either SAP AG or SAP
19 America is a "violation" under the CFAA. In addition, plaintiffs have not established liability
20 under agency principles. Federal common law controls with regard to federal claims such
21 as the CFAA. See, e.g., Sun Microsystems, Inc. v. Hynix Semiconductor, Inc., 622 F.Supp.
22 2d 890-99 (N.D. Cal. 2009). Here, plaintiffs have not shown any manifestation by SAP AG
23 or SAP America that SAP TN act on their behalf; have not established that SAP TN
24 accepted this undertaking; and have not established that there was an understanding
25 among the defendants that SAP AG or SAP America was to be in charge of the
26 undertaking. Plaintiffs simply assert that SAP TN's downloading was within the scope of
27 SAP TN's authority as agent for SAP AG and SAP America, but this is not sufficient to
28 establish liability under the federal common law of agency.

1 C. Defendants' Motion

2 Defendants seek a ruling that OEMEA's California claims should be dismissed; that
3 plaintiffs may not recover damages incurred by related non-parties; that "saved
4 development costs" are an impermissible measure of damages, for both the non-copyright
5 claims and the copyright claims; and that plaintiffs may not recover under claims for which
6 they did not disclose damage calculations.

7 1. OEMEA's California claims

8 OEMEA is an Irish private limited company with its principal place of business in
9 Ireland, and which has software distribution rights in Europe, the Middle East, and Africa.
10 OEMEA asserts state law claims of intentional and negligent interference with prospective
11 economic advantage, unfair competition, unjust enrichment/restitution, and entitlement to
12 an accounting, against all defendants.

13 Defendants argue that OEMEA's claims fail as a matter of law because California
14 does not provide a remedy for non-residents alleging injuries caused by out-of-state
15 conduct, and because applying California law to extraterritorial claims runs afoul of the due
16 process clause of the U.S. Constitution.

17 The court finds that the motion must be GRANTED, as plaintiffs have failed to show
18 the required California nexus. In general, "a court should not ordinarily construe a statute
19 as regulating occurrences outside the state unless a contrary intention is clearly expressed
20 or reasonably can be inferred from the language or purpose of the statute." J.P. Morgan &
21 Co., Inc. v. Superior Court, 113 Cal. App. 4th 195, 221 (2003) (citing Norwest Mortgage,
22 Inc. v. Superior Court, 72 Cal. App. 4th 214, 222 (1999)).

23 Thus, for example, courts have held with regard to UCL claims that while the UCL
24 applies to wrongful conduct that occurs out-of-state but results in injury in California,
25 regardless of the injured party's citizenship, the UCL does not apply to out-of-state conduct
26 that does not cause injury in California. See Speyer v. Avis Rent a Car Sys., Inc., 415
27 F.Supp. 2d 1090, 1098-99 (S.D. Cal. 2005) (citing Norwest Mortgage, 72 Cal. App. 4th at
28 222-25; Yu v. Signet Bank, 69 Cal. App. 4th 1377 (1999)).

1 Here, the relevant question is not whether defendants have operations in California,
2 but whether a sufficient connection exists between those operations and OEMEA's claims.
3 Plaintiffs do not provide evidence sufficient to refute defendants' claims that OEMEA is a
4 non-resident Irish corporation, that it is not registered to do business in California, that it
5 has no customers in California, that its sales territory is limited to Europe and the Middle
6 East, that it suffered no injury in California, and that SAP TN's support and marketing
7 activities for OEMEA customers occurred in Texas and Europe, not in California.

8 While plaintiffs assert that SAP TN's contacts with California were widespread
9 enough to provide a basis for OEMEA's claims in this action, the court notes that plaintiffs'
10 own damages expert Paul Meyer confirmed that OEMEA's alleged damages are based on
11 harm that occurred outside of California. The court finds that plaintiffs have failed to
12 provide evidence sufficient to create a triable issue as to the required California nexus
13 between OEMEA's claims and defendants' operations.

14 2. Damages incurred by related non-parties

15 Defendants contend that plaintiffs may recover only their own lost profits, and that
16 they cannot assert the rights of third parties – even affiliated entities. Defendants assert
17 that because corporations are considered separate legal entities, a plaintiff may seek
18 damages only on its own behalf, and not on behalf of a subsidiary corporation.

19 The Oracle organization consists of a parent corporation (Oracle Corporation) plus
20 hundreds of subsidiary corporations – only four of which (Oracle USA, OIC, OEMEA, and
21 Siebel) are plaintiffs in this action. The court has previously dismissed two other plaintiffs
22 for lack of standing, and defendants contend that plaintiffs cannot circumvent the court's
23 dismissal by seeking to recover damages on behalf of dismissed parties, and also may not
24 recover on behalf of entities they chose not to join as plaintiffs.

25 In opposition, plaintiffs argue that they do not seek to recover the lost profits that
26 defendants are asking the court to bar – that is, they seek only lost support profits to which
27 each plaintiff is legally entitled. Plaintiffs assert that Oracle is not seeking, as defendants
28 argue, to avoid its corporate structure, and reiterate that they are seeking only those lost

1 profits that should have flowed to the individual named plaintiffs.

2 The court finds that the motion must be GRANTED, as plaintiffs have effectively
3 conceded that they do not seek lost profits from non-parties.

4 3. "Saved development costs" as measure of damages

5 Defendants assert that plaintiffs are not entitled to recover damages based on
6 "saved development costs" for any of their claims.

7 a. Non-copyright claims

8 Defendants contend that unjust enrichment damages based on "saved development
9 costs" are not available under claims permitting only the recovery of compensatory
10 damages (the CFAA/CDAFA claims, the breach of contract claim, the trespass to chattels
11 and tortious interference claims); and are also not available under claims permitting only
12 recovery of restitutionary damages (the UCL and unjust enrichment/restitution claims). In
13 opposition, plaintiffs contend that they may pursue "saved development costs" under their
14 unjust enrichment claim, and assert that they do not seek them under any of the other non-
15 copyright claims.

16 With regard to the unjust enrichment/restitution claim, defendants argue that under
17 California law, a plaintiff asserting unjust enrichment may seek only restitution of benefits
18 the plaintiff conferred on the defendant, which the defendant wrongfully retained. Thus,
19 they contend, since Oracle did not literally confer "saved development costs" on defendants
20 in this case, whatever benefit defendants may have incurred as represented by those
21 saved costs is not an appropriate subject of restitution, and plaintiffs cannot recover those
22 costs under the unjust enrichment claim.

23 Plaintiffs submit, however, that the "benefit conferred" need not be money or
24 property directly conferred on the defendant, but can also be something that saves the
25 defendant from expense or loss. In support, plaintiffs cite Ghirardo v. Antonioli, 14 Cal. 4th
26 39 (1996). In that case, the court noted that "[u]nder the law of restitution, an individual
27 may be required to make restitution if he is unjustly enriched at the expense of another,"
28 and that "[a] person is enriched if he receives a benefit at another's expense." The court

1 added that “[t]he term ‘benefit’ denotes any form of advantage,” and that a benefit is
2 conferred “not only when one adds to the property of another, but also when one saves the
3 other from expense or loss.” However, “[e]ven when a person has received a benefit from
4 another, he is required to make restitution only if the circumstances of its receipt or
5 retention are such that, as between the two persons, it is unjust for him to retain it.” *Id.* at
6 51 (citing Restatement, Restitution § 1, com. (a), (c)).

7 Here, plaintiffs assert, the fact that Oracle did not directly confer the “saved
8 development costs” on defendants does not mean that plaintiffs may not recover those
9 “saved development costs” as damages.

10 Plaintiffs also cite *Ajaxo, Inc. v. E*Trade Group, Inc.*, 135 Cal. App. 4th 21 (2005). In
11 that case, the defendant (E*Trade) gave the plaintiff’s trade secrets to one of the plaintiff’s
12 competitors, which used the trade secrets and saved some development costs for E*Trade.
13 The court upheld an award of damages that included the saved development costs based
14 on a theory of unjust enrichment/restitution. *Id.* at 55-57. The court held that the purpose
15 of unjust enrichment/restitution is to require the wrongdoer to restore what he has received,
16 and thus restitution required E*Trade to return to the plaintiff the value or benefit that it
17 received from the plaintiff’s competitor. *Id.* at 56. The court also held that the saved
18 development costs provided evidence of unjust enrichment on the plaintiff’s claim for
19 misappropriation of trade secrets – a claim that plaintiffs argue is analogous to defendants’
20 conduct here.

21 The court find that the motion must be GRANTED. Plaintiffs cannot recover “saved
22 development costs” for alleged unjust enrichment, where plaintiffs retained their right to
23 use, distribute, license, and profit from the software and support materials at issue. It
24 would not be equitable, logical, or legally permissible to award plaintiffs the full replacement
25 value of property that they never lost or gave away.

26 The cases on which plaintiffs rely do not support their argument as applied to the
27 facts of the present case. *Ghirardo* does not support a ruling that plaintiffs can recover the
28 full replacement value of their intellectual property absent loss or conveyance of that

1 property, as the court there simply permitted a plaintiff who had conveyed real property to
2 the defendant to recover the unpaid balance of the purchase price. The remaining cases
3 (Ajaxo and cases cited for the same point as Ajaxo) concern trade secret claims in which
4 the court permitted recovery of “development costs” saved by misappropriating, rather than
5 developing, the trade secrets at issue. Moreover, these cases are inapposite because,
6 unlike the contract or tort claims for which plaintiffs’ unjust enrichment claim serves as an
7 alternative here, trade secret law allows recovery of saved development costs.

8 b. Copyright claims

9 Defendants also assert that “saved development costs” are not a permissible
10 measure of recovery for the copyright claims. Apart from statutory damages, the Copyright
11 Act provides for two types of monetary recovery – actual damages, and recovery of
12 wrongful profits. “These remedies are two sides of the damages coin – the copyright
13 holder’s losses and the infringer’s gains.” Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d
14 700, 708 (9th Cir. 2004). Actual damages are awarded to compensate for demonstrable
15 harm caused by the infringement. 17 U.S.C. § 504(b); Polar Bear, 384 F.3d at 708.
16 Infringer’s profits are analyzed from the infringer’s point of view – if the infringer has earned
17 a profit, it must disgorge that profit so that it does not benefit from wrongdoing. Id.

18 Courts have applied different calculations to determine the amount of actual
19 damages that a copyright owner is entitled to recover as a result of infringement. One
20 method assesses the damage to the “fair market value” of the plaintiff’s work caused by the
21 defendant’s infringement. See, e.g., Abend v. MCA, Inc., 863 F.2d 1465, 1479-80 (9th Cir.
22 1988). Another method attempts to prove actual damages by indirectly proving the
23 plaintiff’s lost profits. This method is often impractical because of the difficulty of proving
24 such lost profits with specificity. See, e.g., Polar Bear, 384 F.3d at 709-10.

25 In Sid & Marty Krofft Television Prods, Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th
26 Cir. 1977), the Ninth Circuit held that “[t]he value of an infringer’s use is a permissible basis
27 for estimating actual damages.” Id. at 1174. The test of market value is “what a willing
28 buyer would have been reasonably required to pay to a willing seller for plaintiffs’ work.”

1 Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 512 (9th Cir. 1985)
2 (quoting id.).

3 In Deltak, Inc. v. Advanced Sys., Inc., 767 F.2d 357 (7th Cir. 1985), the defendant
4 copied the plaintiff's written materials, and distributed the copies without charge to its
5 customers. Because the materials were not registered, and no sales resulted, the court
6 attempted to resolve the question of how to determine damages when there had been no
7 profit to the infringer and no lost sales to the copyright holder. The Seventh Circuit cited
8 Krofft, but equated "value of use" with the fair market value of the infringed materials, as it
9 found that there were damages in the value of the use of the infringing materials to the
10 infringer. Id. at 360-63. The court concluded that "[e]ach of the copies [defendant]
11 distributed had a value of use to it equal to the acquisition cost saved by infringement
12 instead of purchase, which [defendant] was then free to put to other uses." Id. at 361.

13 In the present case, plaintiffs' expert Mr. Meyer measured actual damages for
14 copyright infringement using both a traditional lost profits analysis, and a "fair market value"
15 license analysis. For the latter, he calculated "hypothetical licenses" using three different
16 approaches – a "market approach," an "income approach," and a "cost approach."
17 According to Mr. Meyer, "[t]he cost approach attempts to measure the future benefit of the
18 intellectual property by quantifying the cost to develop alternative technology or replace the
19 technology being valued."

20 The underlying assumption, according to Mr. Meyer, "is that the cost to buy or
21 develop alternative intellectual property is commensurate with the economic benefit, or
22 value, of the intellectual property." Thus, under this "cost approach," Mr. Meyer considered
23 the acquisition cost to Oracle of purchasing the intellectual property from PeopleSoft and
24 J.D. Edwards, plus the amounts that PeopleSoft and J.D. Edwards spent on research and
25 development, plus the amounts Oracle has subsequently spent in research and
26 development in connection with the copyrighted materials. Thus, plaintiffs are seeking to
27 recover damages based on the purported amount that defendants would have spent to
28 acquire the relevant technology through their own development efforts – that is, the amount

1 that defendants saved by infringing, rather than developing or directly purchasing, the
2 technology.

3 Defendants contend that there is no authority to support Mr. Meyer's reliance on a
4 "cost approach" to calculate the value of a fair-market value license. In their prior motion
5 for partial summary judgment, on the question of the availability of "hypothetical license"
6 damages, defendants argued that plaintiffs were not entitled to such damages if they were
7 based on "saved acquisition costs." In the January 28, 2010 order denying defendants'
8 motion, the court held that plaintiffs were not precluded from seeking actual damages for
9 copyright infringement in the form of a "fair market value" or "hypothetical" license.

10 The court found it unnecessary to reach the specific question whether "saved
11 acquisition costs" are a permissible component of such a license, as it assumed, based on
12 the particular facts of this case, and also based on the relevant case law, that any damages
13 in the form of a "hypothetical license" would more or less replicate the costs to defendants
14 of acquiring a license permitting the use of the allegedly infringed copyrights (though not
15 the costs of acquiring ownership of the copyrights). The court notes, in addition, however,
16 that no court in this Circuit has considered "saved costs" when calculating a fair market
17 value license, and the Ninth Circuit's "value of use" analysis says nothing about "saved
18 costs."

19 In any event, the concept of "saved development costs" raises an entirely different
20 issue – whether plaintiffs are entitled to recoup all their research and development costs as
21 actual damages for defendants' infringement. The court has located no case law
22 supporting a theory of copyright damages based on "saved development costs," and
23 plaintiffs have proffered none. Thus, the court is not persuaded by plaintiffs' argument that
24 authority exists for such a proposition. Even the Seventh Circuit – which in Deltak
25 introduced the concept of "saved acquisition costs" as a measure of actual damages (and
26 for which it has been criticized by commentators and other courts) – did not go so far as
27 plaintiffs would have this court go.

28 Accordingly, in the absence of Ninth Circuit authority for awarding research and

1 development costs to plaintiffs as actual damages for infringement, this court declines to
2 permit plaintiffs to seek such damages.⁵ Defendants' motion is GRANTED.

3 4. Claims for which plaintiffs did not disclose damage calculations

4 Defendants argue that plaintiffs may not recover damages for any claims for which
5 they did not disclose damages calculations – specifically, the trespass to chattels claim,
6 and the CDAFA claim. They argue that under Rule 26(a)(1), a plaintiff is required to
7 provide in its initial disclosures a computation of each category of damages claimed, and
8 that failure to do so results in exclusion of evidence.

9 Defendants assert that it is undisputed that plaintiffs did not disclose in their initial
10 disclosures any damages calculations for their trespass to chattels claim, as they made
11 only general allegations of damage to Oracle's "computers, data, and systems" caused by
12 SAP TN's alleged trespass on plaintiffs' computer systems. Defendants contend that even
13 in their supplemental and amended disclosures, plaintiffs provide no calculations or
14 amounts to establish any actual damages, stating only that such amounts will be provided
15 "in connection with Oracle's expert report or before" – and that no such calculations have
16 been forthcoming.

17 In opposition, plaintiffs argue that they have disclosed all the damages they intend to
18 seek for their trespass to chattels and CDAFA claims. Those damages, according to
19 plaintiffs, include lost profits, harm and impairment to Oracle's computer systems,
20 investigation costs, attorney's fees, and punitive damages. They contend that the cited
21 investigation and lost profits damages evidence is what their damages expert relied on and
22 quantified in his expert report.

23 The court finds that the motion must be DENIED, as inappropriate for resolution on a
24

25 ⁵ Even were there some authority for calculating actual damages under the Copyright
26 Act using a "saved development costs" calculation, the court finds plaintiffs' calculations to be
27 highly speculative, as they are based on the amounts that Oracle allegedly spent to develop
28 and/or acquire the intellectual property at issue, not on what it would have cost SAP for
research and development. As noted above, actual damages based on "value of use" are
derived from "the value of an infringer's use," and plaintiffs have provided no evidence of what
SAP would have spent.

summary judgment motion. Defendants are, of course, free to move for preclusion of evidence of damages as to which plaintiffs may have failed to comply with the disclosure requirements.⁶

CONCLUSION

In accordance with the foregoing, the court rules as follows:

1. Plaintiffs' motion for summary judgment as to SAP TN's liability for direct infringement of the three HRMS registrations at issue is GRANTED as to the post-March 1, 2005 period, based on defendants' concessions, and DENIED as to the pre-March 1, 2005 period.

2. Defendants' cross-motion for summary judgment of non-infringement based on pre-March 1, 2005 conduct with regard to the three HRMS registrations at issue is DENIED.

3. Plaintiffs' motion for summary judgment as to the SAP TN's liability for direct infringement of the three Database registrations at issue is GRANTED without time limitation, based on defendants' concessions.

4. Plaintiffs' motion for summary judgment as to SAP AG's and SAP America's liability for vicarious infringement of the six registrations at issue is GRANTED, based on defendants' concessions.

5. Plaintiffs' motion for summary judgment as to SAP AG's and SAP America's liability for contributory infringement of the six registrations at issue is DENIED.

6. Plaintiffs' motion for summary judgment as to SAP TN's liability for violation of CFAA § (a)(2)(C) is GRANTED, based on defendants' concessions; and is DENIED as to SAP TN's liability for violation of CFAA § (a)(5)(A)(i)-(iii).

7. Plaintiffs' motion for summary judgment as to SAP TN's liability for violation of the CDAFA is GRANTED, based on defendants' concessions.

8. Plaintiffs' motion for summary judgment as to SAP AG's and SAP America's

⁶ In light of this ruling, the court also does not decide whether plaintiffs' damages under the CDAFA should be limited to no more than alleged "investigation costs."

1 indirect liability for violation of the CFAA is DENIED.

2 9. Plaintiffs' motion for summary judgment as to SAP AG's and SAP America's
3 indirect liability for violation of the CDAFA is DENIED.

4 10. Defendants' motion for summary judgment as to OEMEA's California claims
5 is GRANTED.

6 11. Defendants' motion for summary judgment as to damages incurred by non-
7 parties is GRANTED.

8 12. Defendants' motion for summary judgment as to "saved development costs"
9 as a measure of damages is GRANTED, as to both non-copyright claims and copyright
10 claims.

11 13. Defendants' motion for summary judgment as to claims for which plaintiffs did
12 not disclose damage calculations is DENIED.

13 14. The parties' objections to evidence are OVERRULED.
14

15 **IT IS SO ORDERED.**

16 Dated: August 17, 2010



PHYLLIS J. HAMILTON
United States District Judge

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORACLE USA, INC, a Colorado
 Corporation, *et. al.*,

Plaintiffs,

vs.

SAP AG, a German corporation, *et. al.*,

Defendants.

CASE NO.: 2:09-CV-01591 KJD (GWF)

Pending in CASE NO.: 07-CV-01658 PJH
 (EDL) (N.D. Cal.)

**NON-PARTY SETH RAVIN'S AND
 NON-PARTY RIMINI STREET'S
 OPPOSITION TO ORACLE'S MOTION
 TO COMPEL SETH RAVIN TO
 ANSWER DEPOSITION QUESTIONS
 AND TO COMPEL RIMINI STREET
 TO PRODUCE DOCUMENTS**

Hrg. Date: October 6, 2009, 9:30am
 Before: Hon. George W. Foley, Jr.
 Courtroom: 3A

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1 Non-Party Seth Ravin (“Ravin”) and Non-Party Rimini Street, Inc. (“Rimini Street”)
2 (together, the “Non-Parties”) respectfully submit this Memorandum of Points and Authorities in
3 Opposition to the Motion to Compel Ravin to Answer Deposition Questions and to Compel
4 Rimini Street to Produce Documents in Response to Oracle’s Subpoena (“Motion”), filed by
5 Plaintiffs Oracle USA, Inc., Oracle International Corporation, and Oracle EMEA Limited
6 (collectively, “Oracle”).

7 **I. INTRODUCTION**

8 By its motion, Plaintiff Oracle is seeking to compel certain discovery (the “Discovery”)
9 from its competitor, Non-Party Rimini Street, hoping to discover that Rimini Street is infringing
10 Oracle’s copyrights. Oracle attempts to justify its intrusive and burdensome third party
11 discovery requests on the grounds that whether or not Rimini Street infringes Oracle’s copyrights
12 is purportedly relevant to the damages Oracle is entitled to collect against the defendants
13 TomorrowNow, Inc. (“TomorrowNow”) and its parent, SAP, AG (“SAP”) in the underlying
14 litigation in California (the “SAP Litigation”). But it is undisputed that lost profits damages in a
15 copyright case are measured by the “profits that the plaintiff might have accrued *but for the*
16 *defendant’s infringement.*” 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §
17 14.02[A][1] at 14-14 (2009) (emphasis added); *see also Polar Bear Prods., Inc. v. Timex Corp.*,
18 384 F.3d 700, 709 (9th Cir. 2004). Contrary to Oracle’s assertion, copyright damages *do not*
19 depend on whether *third party competitors* infringe the plaintiff’s copyrights, and Oracle does
20 not cite any authority holding otherwise. Thus, whether or not *Rimini Street* infringes Oracle’s
21 copyrights (which Rimini Street denies) simply has no relevance to what damages, if any,
22 defendants might owe, or any other issue in the SAP Litigation.

23 Given its complete lack of relevance, it is therefore not surprising that both Oracle and
24 SAP apparently agree that discovery into the technical details of Rimini Street’s operations is not
25 relevant. In a prior discovery dispute between the parties in the underlying suit, referenced by
26 Oracle in its Motion (*see* Motion at 7), Oracle successfully resisted SAP’s discovery requests
27 regarding Rimini Street on relevance grounds, telling the court that “information regarding
28 Rimini Street — or any other third-party support provider — *do not relate to any claim or*

1 *defense in this case*” and that “third-party support requests” cannot be justified “as damages
2 discovery.” Declaration of Michael B. Levin (“Levin Decl.”), Exhibit (“Ex.”) A at p. 4
3 (emphasis added).

4 Notwithstanding the fact that Oracle served the Discovery, Oracle apparently does not
5 believe it is relevant. In connection with the present Motion, Oracle recently conceded that it did
6 **not** seek the Discovery “because **Oracle** believed it was relevant.” Levin Decl., Ex. B at 3.
7 Rather, Oracle claims it served the Discovery because SAP supposedly believes it is relevant.
8 *Id.*; Motion at 7. However, SAP has made it quite clear it **does not** believe the Discovery is
9 relevant. After receiving a copy of Oracle’s Motion, SAP’s counsel indicated that it disputes
10 Oracle’s claim that SAP believes the Discovery is relevant, and that it plans to submit a separate
11 filing with this Court confirming this. Levin Decl., ¶¶ 39-42. Given the parties’ apparent
12 agreement that the Discovery is irrelevant,¹ that should end the inquiry, as lack of relevance is a
13 sufficient ground for denying Oracle’s motion to compel. *See Epstein v. MCA, Inc.*, 54 F.3d
14 1422, 1424-25 (9th Cir. 1995).

15 In a highly analogous case, the Federal Circuit in *Micro Motion* quashed a subpoena
16 inquiring into whether a non-party competitor infringed the plaintiff’s intellectual property
17 rights, which — as Oracle argues here — the plaintiff claimed was relevant to address a possible
18 defense to the plaintiff’s lost profits damages theory. *See Micro Motion, Inc. v. Kane Steel Co.*,
19 894 F.2d 1318, 1324-25 (Fed. Cir. 1990). There, the Court held that if merely asserting a lost
20 profits damages theory were sufficient to justify intrusive discovery into whether a non-party
21 infringes, a plaintiff “could, in virtually every infringement suit, obtain immediate discovery
22

23
24 ¹ Oracle incorrectly asserts that the California court found the Discovery to be relevant. *See*
25 Motion at 8-9. In fact, because the Oracle subpoenas issued out of the District of Nevada, the
26 California court has never ruled upon the legitimacy of the Discovery, and has no jurisdiction to
27 do so. Indeed, the statements from Magistrate Judge Laporte cited by Oracle were made in the
28 context of a discovery conference addressing the **length** of Mr. Ravin’s deposition. To the extent
Judge Laporte provided preliminary thoughts on relevance, these were made without briefing on
the subject, and **nearly two months before** the Discovery requests at issue here were even made
by Oracle. Thus Judge Laporte did not rule, and could not have ruled, upon their legitimacy.

1 from all possible competitors by merely filing a complaint asking for damages against one.” *Id.*
2 at 1324-25. Fortunately, that is not the law.

3 Even if Oracle could articulate some speculative theory of relevance, it is clear that
4 Oracle’s true purpose for serving the Discovery is an improper attempt to take pre-complaint
5 discovery. In late 2008 and early 2009, Oracle began making threats against Rimini Street
6 concerning a potential claim that Rimini Street infringes Oracle’s intellectual property rights, and
7 began seeking from Rimini Street information concerning such allegations, hoping Rimini Street
8 would consent to a voluntary audit. Declaration of Seth Ravin (“Ravin Decl.”), ¶ 7. The same
9 day that Oracle and Rimini Street had their last conversation on the subject, Oracle executed
10 subpoenas for three Rimini Street executives, including Ravin, which it served a week later.
11 This timing suggests Oracle’s third party discovery requests are part of a fishing expedition into
12 Rimini Street’s confidential business operations, presumably in the hopes of obtaining evidence
13 for a claim against Rimini Street. Over the last several years, Oracle has successfully used the
14 litigation process to shut down one competitor, TomorrowNow. Now, Oracle is seeking to
15 impede Rimini Street’s growth and further success in the marketplace through, among other
16 things, its improper and intrusive third party discovery requests.² Rimini Street respectfully
17 requests that this Court not condone such behavior.

18 Notwithstanding the lack of relevance of the Discovery, Oracle poses a classic catch-22
19 in its Motion: According to Oracle, if Rimini Street is not infringing, it should have nothing to
20 hide; but if Rimini Street is infringing, then it should not be permitted to avoid producing such
21 evidence. *See* Motion at 5:4-5:6. This is pure sophistry. Rather, Rimini Street submits that the

22
23 ² No doubt, Oracle was also mindful of the media attention it would gain from bringing this
24 Motion, and the unsubstantiated accusations contained in it. Shortly after Oracle filed its motion,
25 several media outlets reported on the motion, quoting Oracle’s misleading statements suggesting
26 that Rimini Street might be misappropriating Oracle’s intellectual property rights. *See* Levin
27 Decl., Ex. C. As one commentator has noted, this is just the latest in Oracle’s attempts to use the
28 legal process to inhibit competition in the marketplace. *See* Levin Decl., Ex. D (“Oracle’s high-
stakes game of ‘Winning by Litigating Competitors into Submission’ has been working so far.
So why stop now?”). Oracle currently earns approximately 84% gross margins on the fees it
charges its customers for annual support services, and those fees now account for at least 50% of
Oracle’s total revenues. *See* Levin Decl., Ex. BB.

1 proper analysis should be: If Oracle has sufficient evidence that Rimini Street is infringing
2 (which it does not),³ Oracle is free to bring an infringement action against Rimini Street, where it
3 can seek damages allegedly caused by Rimini Street. If, on the other hand, Oracle has no basis
4 to bring suit (as indeed it does not), Oracle should not be permitted to use non-party discovery
5 requests into Rimini Street's confidential and trade secret operations for the purpose of a fishing
6 expedition looking for alleged infringement purportedly for purposes of determining what
7 damages SAP owes in the SAP Litigation.

8 Given Oracle's complete failure to articulate any support for its theory of relevance,
9 given Oracle's own admissions that the discovery it is seeking is not relevant, and given Oracle's
10 mischaracterizations of SAP's positions (and the court's supposed "findings"), Rimini Street
11 respectfully requests that the Court deny the Motion, and require Oracle to pay the costs and fees
12 Rimini Street has incurred as a result of Oracle's improper and abusive discovery practices.

13 **II. FACTUAL BACKGROUND**

14 **A. Rimini Street Competes With Oracle and SAP as a Third Party Support 15 Provider**

16 More than four years ago, Ravin founded Rimini Street for the purpose of providing
17 third-party support and maintenance services for enterprise software at a substantial discount
18 compared to the prices charged by the major software vendors. *See* Ravin Decl., ¶¶ 2-3. Rimini
19 Street allows customers to maximize their return on existing software investments with support
20 programs that provide more than 50% savings on annual support fees, eliminating forced
21 upgrades, and delivering other services not available within standard vendor support. *Id.*
22 Based on its proprietary processes, Rimini Street consistently provides quality tax and regulatory

23
24 ³ As Oracle concedes, it is not illegal to offer third party support services to Oracle's
25 enterprise software customers. *See* Motion at 3:11. Rimini Street has been legally operating its
26 business since its founding in 2005, and neither Oracle nor any other company has sued Rimini
27 Street alleging intellectual property infringement. Oracle's motion to compel relies entirely on
28 innuendo and speculation, hoping to leave the impression that Rimini Street is a mere "carbon
copy" of TomorrowNow, which Oracle contends is infringing its intellectual property rights.
While Rimini Street offers many similar services as TomorrowNow formerly offered, that does
not make Rimini Street an infringer.

1 updates to its customers ahead of the date on which Oracle provides updates to its customers.
2 Ravin Decl., ¶¶ 15-16. Today, Rimini Street is a leading third-party maintenance
3 provider, offering support for Oracle's PeopleSoft, Siebel and J.D. Edwards product lines, as
4 well as for products offered by defendant SAP. *Id.* ¶ 4. Not surprisingly, Rimini Street's
5 discounted service offerings have made Rimini Street a target of both the parties in the
6 underlying action, Oracle and SAP.

7 **B. Oracle's Successful Effort to Shut Down TomorrowNow Through Scorched**
8 **Earth Litigation**

9 In March 2007, two years after Ravin had left TomorrowNow to start Rimini Street,
10 Oracle filed the underlying suit in the Northern District of California, alleging, *inter alia*, that
11 third party support provider TomorrowNow had made illegal downloads of Oracle's copyrighted
12 software. Oracle also named SAP, which had acquired TomorrowNow in early 2005. In May
13 2007, SAP's CEO publicly stated that Oracle's purpose in bringing the lawsuit was "to limit
14 customer choices by trying to discredit their competition." Levin Decl., Ex. E. The SAP
15 Litigation has already achieved that purpose, as TomorrowNow shut down operations last fall as
16 a result of Oracle's litigation campaign. Levin Decl., Ex. F.

17 Oracle has been employing "scorched earth" tactics in the SAP Litigation. Oracle has
18 taken more than 300 hours of depositions, and has served over 100 third party subpoenas. Levin
19 Decl., Ex. G at 1. In response to Oracle's discovery requests, defendants have produced more
20 than 7 million pages of documents, and more than 17 terabytes of electronic data. *Id.* The
21 parties have engaged in frequent motion practice, and there have already been more than 450
22 pleadings filed in the case. The suit is currently scheduled to go to trial in November 2010.

C. Oracle's Efforts to Obtain Irrelevant, Proprietary and Burdensome Information From Rimini Street

Beginning in 2008, Oracle began raising questions with Rimini Street about whether or not Rimini Street was potentially violating Oracle's intellectual property rights. Ravin Decl., ¶ 7. Oracle became increasingly aggressive, and in December 2008 and January 2009 demanded that Rimini Street voluntarily provide certain confidential information regarding Rimini Street's proprietary processes, including agreeing to an audit, *id.*, no doubt hoping that the results would allow Oracle to bring a copyright infringement claim against Rimini Street. The last communication between Oracle and Rimini Street on this subject occurred on February 2, 2009. Levin Decl., ¶ 29.

At that point, Oracle apparently decided to take a different tack. On the very same day as the last conversation between Oracle's counsel and Rimini Street's counsel, Oracle's counsel in the SAP Litigation executed deposition and document subpoenas with respect to three Rimini Street executives, Ravin and George and Beth Lester, who were served shortly thereafter. Levin Decl., Ex. H; Ex. I; Ex. J. Oracle thus began using the SAP Litigation to attempt to obtain the very same pre-complaint discovery regarding potential infringement allegations that it had previously been trying to pursue from Rimini Street.

Although the three subpoenas sought information relating to the witnesses' former employment at TomorrowNow, they were not limited to TomorrowNow topics. They also included requests regarding Rimini Street's operations. *See, e.g., id.* at Requests Nos. 5, 8(iii), 9, 10. During the parties' meet and confer discussions, Ravin and the Lesters objected to providing any information concerning Rimini Street. Levin Decl., ¶¶ 30-31. At the time, counsel for Oracle agreed that these witnesses would not have to produce any Rimini Street documents. *Id.* ¶ 31.

Nonetheless, at Ravin's deposition, Oracle attempted to obtain confidential information relating to Rimini Street, including Rimini Street's proprietary methodologies used to develop, test, package and deliver to customers software, updates and fixes. While counsel allowed Ravin to answer some high level foundational questions so as to avoid a potentially unnecessary

1 discovery dispute, counsel objected that a number of these questions were being improperly
2 interposed as attempts to obtain pre-litigation discovery, improper inquiries into competitive
3 trade secrets, and sought information wholly irrelevant to the SAP Litigation. *See* Levin Decl.,
4 Ex. K; Ex. L. Counsel for the parties agreed Oracle could continue asking additional non-Rimini
5 Street questions and that Oracle would notify Rimini Street's counsel if it intended to seek a
6 motion to compel regarding the unanswered questions, which is at issue here.

7 Shortly before the Ravin deposition, Oracle served a document subpoena on Rimini
8 Street, which is also at issue here. *See* Russell Decl., Ex. L. As discussed in Section III.E, *infra*,
9 the subpoena requests confidential information concerning Rimini Street's proprietary business
10 and technical operations. In response to the subpoena, Rimini Street asserted timely objections.
11 Levin Decl., Ex. M. Rimini Street objected to the relevance of the requests relating to Rimini
12 Street's "business model." Nonetheless, to avoid a discovery dispute, Rimini Street produced
13 what Rimini Street believes are documents "sufficient to show" Rimini Street's business model,
14 including the products Rimini Street offers, the advantages those products provide, and
15 information regarding Rimini Street's pricing. Ravin Decl., ¶¶ 11-14. Because it was irrelevant,
16 burdensome and intrusive pre-litigation discovery, Rimini Street did not produce the additional
17 technical information sought by the subpoena. During the parties' meet and confer session,
18 Oracle failed to provide any legal authority supporting the relevance of the legality of a non-
19 party's products or services to the copyright damages owed by an unrelated party. Levin Decl., ¶
20 35.

21 On August 21, 2009, Oracle filed the Motion. Thereafter, on September 2, 2009, counsel
22 for SAP requested that Oracle and Rimini Street meet and confer, noting that SAP believed that
23 Oracle had mischaracterized SAP's position concerning relevance in the Motion. Levin Decl.,
24 Ex. N. During the subsequent meet and confer teleconference, counsel for SAP indicated SAP's
25 belief that the Discovery was ***not relevant***. Levin Decl., ¶¶ 39-42. SAP's counsel further
26 indicated that if Oracle is successful in obtaining the Discovery, SAP would potentially seek
27
28

1 additional discovery from Ravin and Rimini Street, presumably to rebut Oracle's attempts to
2 prove Rimini Street's operations are illegal. *Id.*⁴

3 **III. ORACLE'S MOTION TO COMPEL SHOULD BE DENIED IN ITS ENTIRETY**

4 **A. Applicable Legal Standards**

5 Rule 26 provides that discovery should not be permitted in either of two circumstances:

6 (i) where it is not relevant, or (ii) where the burden or expense of the proposed discovery

7 outweighs its likely benefit in light of the relevant factors. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii).

8 In the context of a motion to compel, when a subpoena to a non-party seeks confidential

9 commercial information, the burden is on the demanding party to show a substantial need for the

10 information that cannot otherwise be met without undue hardship. *See Katz v. Batavia Marine &*

11 *Sporting Supplies, Inc.*, 984 F.2d 422, 424-25 (Fed. Cir. 1993); *Nugget Hydroelectric L.P. v.*

12 *Pac. Gas & Elec. Co.*, 981 F.2d 429, 438-39 (9th Cir. 1992); *Fort James Corp. v. Sweetheart*

13 *Cup Co.*, No. 97-C-1221, 1998 WL 709813, at *2 (S.D.N.Y. Oct. 8, 1998).⁵

14 Where the discovery sought is not relevant to any issues in the underlying litigation, a

15 motion seeking to compel such discovery will be denied. *Micro Motion*, 894 F.2d at 1325-28;

16 *Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619, 622-23 (9th Cir. 1999). While relevancy for

17 the purposes of Rule 26 is broadly construed, the potential for discovery abuse is ever-present,

18 and courts are authorized to limit discovery to that which is proper and warranted in the

19 circumstances of the case. *See* Fed. R. Civ. P. 26(b)(1); *Micro Motion*, 894 F.2d at 1325; *Katz*,

20
21 ⁴ Oracle, SAP and Rimini Street further agreed that SAP could submit a response to the
22 Motion on the same day Rimini Street's opposition is due, that Rimini Street could submit any
23 response to SAP's filing on September 17, 2009, with Oracle submitting any further response in
24 conjunction with its Reply on September 24, 2009. Levin Decl., Ex. O.

25 ⁵ Oracle cites a Federal Circuit decision, *Truswal Systems Corp. v. Hydro-Air Engineering,*
26 *Inc.*, 813 F.2d 1207, 1210 (Fed. Cir. 1987), for the proposition that an ancillary court reviewing a
27 discovery dispute should be "hesitant to pass judgment on what constitutes relevant evidence" in
28 the main action. Motion at 12. In a highly analogous subsequent decision, however, the Federal
Circuit distinguished *Truswal*, finding the ancillary court's deference to the plaintiff's relevance
arguments in permitting discovery of a non-party competitor was an abuse of discretion. *See*
Micro Motion, 894 F.2d at 1324-25 (declining to remand the relevancy inquiry to the trial court,
and finding that deference should not be given where the specific relevancy question has not
been given proper consideration in the main action).

1 984 F.2d at 424. Merely intoning that the discovery sought from a non-party is relevant to
2 plaintiff's damage theory is insufficient to establish relevancy for purposes of discovery. *See*
3 *Micro Motion*, 894 F.2d at 1325. Nor is a protective order a substitute for demonstrating
4 relevance. *Id.*; *Cacique*, 169 F.3d at 622-23.

5 Courts must exercise particular caution when determining whether to permit discovery of
6 commercial information from a non-party competitor, for a holding to the contrary can
7 potentially lead to abuse by enabling a plaintiff "in virtually every infringement suit, [to]
8 immediately obtain discovery from all possible competitors by merely filing a complaint asking
9 for damages against one." *Micro Motion*, 894 F.2d at 1324-25. Although discovery of persons
10 not party to the litigation is contemplated by the Rules, the fact of non-party status may be
11 considered by the court in weighing the burdens imposed in the circumstances. *Katz*, 984 F.2d at
12 424.

13 **B. The Information Oracle Is Seeking Is Not Relevant to the Underlying**
14 **Litigation**

15 **1. The Parties Agree that Discovery Concerning the Details of Rimini**
16 **Street's Operations Is Not Relevant**

17 The discovery Oracle seeks is simply not relevant to any issue in the SAP Litigation. In
18 fact, it appears that — other than Oracle in connection with the present motion — the parties to
19 the SAP Litigation *agree* that information regarding the legality of, and technical details
20 concerning, Rimini Street's services and operations are *not relevant*.

21 **a. Oracle Previously Successfully Argued that Rimini Street**
22 **Discovery Is Irrelevant**

23 Oracle has repeatedly made concessions that discovery concerning the third party support
24 market is not relevant to any issue in the SAP Litigation, including damages. In its Motion,
25 Oracle cites a January 28, 2008 letter from SAP (*see* Motion at 7) regarding an earlier discovery
26 dispute in which SAP was seeking information from Oracle concerning third party maintenance
27 providers, including Rimini Street. However, Oracle's Motion makes a telling and material
28 omission — Oracle's February 7, 2008 *response* to the letter quoted in the Motion. In that letter,

1 which Oracle failed to provide to this Court (and refused to provide to Rimini Street),⁶ Oracle
2 took the following positions, which are fatal to Oracle's Motion:

3 Nothing in this case relates to the 'market' for third-party support. This case is
4 about Defendants' unlawful access to, and downloading from, Oracle's password-
protected website for their use of those downloaded materials. . . .

5 [Oracle's] *information regarding Rimini Street* — or any other third-party support
6 provider — *do not relate to any claim or defense in this case*. This case is about
Defendants' theft and misuse of Oracle's intellectual property. . . .

7 Neither can Defendants justify their overbroad third-party support requests as
8 damages discovery. . . . Oracle has never claimed, contrary to Defendants'
9 assertion, that it has only lost customers to SAP TN. But, whether another third-
party support provider took customers from Oracle is irrelevant to the claims and
10 defenses here. . . . The issue here is whether Defendants acquired customers by
offering stolen intellectual property and support services provided through the use
11 of that stolen intellectual property. *Whether Oracle lost customers to other third-
party support providers has nothing to do with this case. Defendants have no
12 legal support for spinning their own unlawful acts into a need for market
research into their competitors*. There is none.

13 Levin Decl., Ex. A at 4-8 (emphasis added).

14 Oracle's letter apparently persuaded the court. In denying SAP the discovery it sought,
15 Judge Legge stated in his Report and Recommendation:

16 [SAP's request for discovery concerning third party support] is tangential at best. .
17 . . That information does not appear to be directly or presently relevant.
18 Defendant argues that it will have something to do with damages However,
such extensive third party discovery does not now appear to be justified by those
narrow potential arguments.

19 Levin Decl., Ex. R at 7.

20 While Oracle may argue that circumstances have changed since the 2008 dispute
21 regarding the discoverability of Rimini Street information, Oracle continues to assert that Oracle
22 does not believe Rimini Street discovery is relevant. As stated in recent meet and confer

23 _____
24 ⁶ Because Rimini Street does not have access to much of the record in the SAP Litigation,
25 Rimini Street sought from Oracle's counsel other related pleadings (and unredacted portions of the
26 same pleadings) to those on which Oracle relied in its Motion, and specifically requested a copy of
27 Oracle's February 7, 2008 letter to the Special Master responding to SAP's letter. Levin Decl., ¶¶
28 36-38 & Ex. P. Oracle refused to produce any of the materials Rimini Street requested, or to
provide information as to where such materials could be found among the voluminous record.
Levin Decl., Ex. B (Howard 9/1/09 letter to Levin). Fortunately, however, Rimini Street was able
to locate on PACER a partially unredacted copy of Oracle's February 7, 2008 letter as an exhibit to
a pleading filed in the case. See Levin Decl., ¶ 38 & Ex. A.

1 correspondence, Levin Decl., Ex. B at 3, Oracle claims it is not seeking this discovery “because
2 Oracle believed it was relevant to this case,” but because SAP supposedly believes so.

3 **b. Defendant SAP Agrees With Rimini Street that the Discovery**
4 **Oracle Seeks Is Irrelevant, and Disputes Oracle’s**
5 **Characterizations to the Contrary**

6 Oracle’s sole argument for relevance of the Discovery rests on its position that SAP has
7 made the Discovery relevant to its damages theory. What does SAP have to say about Oracle’s
8 requests? SAP denies the relevance of the Discovery. Levin Decl., ¶¶ 39-42. Rimini Street is
9 informed that SAP intends to file its own submission stating that SAP *does not* contend that the
10 discovery Oracle is seeking is relevant. As indicated in its counsel’s prior correspondence, Levin
11 Decl., ¶¶ 39-42 & Ex. N, SAP believes Oracle has mischaracterized SAP’s position. Thus,
12 Oracle’s entire motion — which is premised on Oracle’s false statement that “Defendants
13 Contend That Rimini Is Relevant to Their Defense” (Motion at 7:3) — crumbles.

14 Contrary to Oracle’s assertion, the SAP letter quoted by Oracle (*see* Motion at 7) does not
15 suggest otherwise. In the 2008 discovery dispute, SAP argued (unsuccessfully) that discovery
16 concerning the existence of alternative third party support options may be relevant to damages
17 because it may show Oracle would have lost sales even if TomorrowNow had not committed the
18 allegedly infringing acts, and thus the damages were not caused by TomorrowNow’s alleged
19 infringement. But SAP was not seeking information concerning the *legality* of other third party
20 support providers, or the technical details of their operations.⁷

21 Because neither Oracle nor SAP believes the legality of Rimini Street’s services —
22 Oracle’s purported justification for the discovery it is seeking — is relevant to any issue in the
23 underlying litigation Oracle’s motion should be denied.

24 ⁷ Oracle contends SAP’s statements requesting discovery on “*how* those companies were doing
25 business” (Motion at 7 (emphasis added by Oracle)) supports Oracle’s position. During meet and
26 confer conversations, counsel for SAP has explained that SAP’s statement was not intended to be
27 an inquiry into the legality of or technical details concerning third party support providers. Rather,
28 in referring to “how” third parties were doing business, SAP was seeking information concerning
whether third parties offered the services required to meet the demand met by TomorrowNow,
such as which product lines they supported for which types of customers. Levin Decl., ¶ 41.

c. **Contrary to Oracle's Claim, the California Court Has Not Ruled on this Issue in Oracle's Favor, But Has Expressed Skepticism as to the Relevance of Third Party Discovery**

Nor is there any basis for Oracle's argument that the California court "found" that discovery into the details of Rimini Street's business model, software tools, checklists, or the legality of Rimini Street's business, is relevant to damages. As far as Rimini Street is aware, the presiding judge, Judge Phyllis J. Hamilton, has not addressed this issue.⁸ As described above, the Special Master originally handling discovery disputes, Judge Charles A. Legge (retired), unequivocally concluded that SAP's requests for discovery concerning Rimini Street "[do] not appear to be directly or presently relevant" to the issues in the case, including to damages. *See* Levin Decl., Ex. R at 7.

Nonetheless, Oracle asserts that Magistrate Judge Elizabeth D. Laporte, who is presently overseeing discovery in the case, "found" that discovery related to Rimini Street is relevant to damages following a March 31, 2009 discovery conference. Motion at 8. Oracle is mistaken.

First, the April 2, 2009 order does not speak to, much less make "findings" on, the relevance of discovery concerning the topics at issue here. Indeed, the discovery requests at issue in this Motion — Oracle's May 18, 2009 subpoena to Rimini Street and the desired further answers to the questions Oracle asked Ravin at his May 21, 2009 deposition — were not propounded by Oracle until *seven weeks after* Judge Laporte's April 2, 2009 order. *See* Motion at 8-9. Accordingly, Judge Laporte could not have made any findings of relevance regarding the specific requests that had not yet been propounded to Rimini Street.

Second, the only issue briefed by the parties was the appropriate *length* of Ravin's deposition. While counsel for Ravin was invited to appear at the discovery conference to address Oracle's request that the parties be given 14 hours to complete Ravin's deposition, neither Ravin nor the parties briefed the appropriate *scope* of Ravin's testimony, as it was premature. Thus, the

⁸ Rimini Street understands that SAP contests Oracle's damages theories in the SAP Litigation, and has recently moved for summary judgment with respect to at least one of the theories. *See* Docket # 447 in Case No. 07-cv-01658-PJH (N.D. Cal.).

1 only “finding” that Judge Laporte made was that Ravin could sit for 10.5 hours of deposition.
2 See Levin Decl., Exs. S (3/31/09 transcript) at 18:8-14 & T (4/02/09 Order).

3 Third, as both Oracle’s counsel and Judge Laporte recognized at the March 31, 2009
4 hearing, Levin Decl., Ex. S at 22:10-14, Judge Laporte did not have jurisdiction to affect the
5 scope of the Ravin subpoena, which issued out of the District of Nevada. So any “findings” by
6 the California court would, in any event, be non-binding.

7 While Judge Laporte indicated at the discovery conference that “the Rimini thing *seems*
8 to have *some* relevance” and stated in her order following the discovery conference that “*some*
9 testimony” regarding Rimini Street “*appears*” relevant, Judge Laporte *did not* indicate what, if
10 anything, was relevant concerning Rimini Street’s business model or technical operations. See
11 Levin Decl., Ex. S at 18:18; Ex. T (emphasis added).

12 Accordingly, Oracle’s suggestion that the California court has already ruled on the
13 relevance of the May 2009 Discovery at issue here is erroneous. As the Federal Circuit held in
14 *Micro Motion*, an ancillary court should not defer to the court in the main action where – as here
15 -- that court has not given “meaningful consideration” to the specific relevancy issue. *Micro*
16 *Motion*, 894 F.2d at 1324, 1325. The Federal Circuit found discovery directed to whether a non-
17 party infringed was not relevant, and that the ancillary court’s failure to require a stronger
18 showing of relevance — in apparent deference to the court in the main action⁹ — was an abuse
19 of discretion. *Micro Motion*, 894 F.2d at 1324, 1325.

20 While Rimini Street respectfully suggests that, as in the *Micro Motion* case, this Court
21 should make its own relevance determination, Rimini Street notes that Judge Laporte has
22 expressed general skepticism with respect to the damages theories that the parties have used to
23 justify other discovery regarding third party support providers. At a February 10, 2009 hearing,
24 Judge Laporte stated that she found the lost profits “causation argument . . . not very convincing

25
26 ⁹ In the *Micro Motion* case, the trial court had generally authorized the reopening of damages
27 discovery with respect to the non-party. *Id.* at 1325. Nonetheless, the Federal Circuit found that
28 the court deciding the motion to quash should have required a proper showing of relevance with
respect to the specific discovery requests. *Id.* at 1324-25.

1 and sort of baffling.” Levin Decl., Ex. U at 38. While Judge Laporte stated she believed that
2 *where* TomorrowNow’s customers went after TomorrowNow shut down in 2008 “has some
3 relevance to damages,” *id.* at 48:18, she also stated “I don’t think it has a whole lot of relevance,”
4 *id.* at 48:6; *see also id.* at 38.¹⁰

5 While Rimini Street does not concede the relevance of information concerning *where*
6 TomorrowNow customers went following TomorrowNow’s shut down, Rimini Street
7 nonetheless has provided discovery on this topic. Ravin testified at his deposition regarding the
8 number of former TomorrowNow customers who switched to Rimini Street, *see* Russell Decl.,
9 Ex. D at 256-57, thus satisfying whatever relevance there might be to this theory.

10 **2. Under the Applicable Copyright Damages Case Law, the Details of**
11 **Rimini Street’s Operations — or Other Information Related to**
12 **Whether Rimini Street Infringes Oracle’s Copyrights — Are Not**
13 **Relevant**

13 The sole basis of relevance asserted for the Discovery is in connection with Oracle’s
14 prayer for lost profits damages under its copyright claim. However, Oracle has wholly failed to
15 show how — under any cognizable lost profits damages theory — the alleged infringement of a
16 *non-party* matters.

17 Under Section 504(b) of the Copyright Act, a plaintiff is entitled to recover, among other
18 things, “the actual damages suffered by him or her as a result of the [defendant’s] infringement.”
19 As stated in the leading copyright treatise, “plaintiff’s damages may be said to equal the profits
20 that the plaintiff might have accrued *but for the defendant’s infringement.*” 4 Nimmer on
21 Copyright, § 14.02[A][1] at 14-14 (emphasis added). Moreover, lost profits may only be
22 recovered when the plaintiff can demonstrate a “legally sufficient causal link between the
23 [defendant’s] infringement and the subsequent indirect profits.” *Polar Bear*, 384 F.3d at 709.

24
25 ¹⁰ Rimini Street notes that, following the February 10 hearing, in a February 11, 2009 order
26 Judge Laporte permitted SAP to take certain very limited “non-burdensome” discovery of Oracle
27 regarding its partnership program, which SAP contended was relevant to Oracle’s “reasonable
28 royalty” theory of damages. Levin Decl., Ex. V. In that order, Judge Laporte made no rulings
regarding the relevance of the *legality* of third party support providers such as Rimini Street.

1 “[M]ere speculation does not suffice to link the losses to the infringement.” *Polar Bear*, 384
2 F.3d at 710; *see also Hamil Am., Inc. v. GFI*, 193 F.3d 92, 108 (2d Cir. 1999).

3 The authority cited by Oracle does not hold otherwise. It merely states the general test
4 for lost profits damages, which, as shown above, is concerned with the damages caused by the
5 *defendant’s* infringement. Rimini Street is unaware of any copyright cases considering whether
6 *non-party competitors* infringe to be relevant to the damages owed by a defendant. Oracle is
7 apparently not aware of any such case either; Oracle previously represented to the California
8 court:

9 Defendants cite no legal support for the argument — and Oracle is aware of none — that
10 Defendants can deduct what they speculate could be “inevitable” losses from the
11 calculation of copyright damages. . . . Defendants’ speculation that customers would
have left Oracle regardless of [Defendants’] unlawful acts is not a defense to any of the
claims here.

12 Levin Decl., Ex. W at 16. Even if “inevitable” losses were a defense to a lost profits damages
13 claim, Oracle has not cited — and Rimini Street is not aware of — any copyright cases
14 precluding such a defense because the losses were to a third party who is alleged to have
15 committed its own acts of infringement.

16 Nonetheless, Oracle baldly asserts that SAP’s damages theory “rests on the assumption
17 that the Rimini [Street] business model is legal and that Rimini [Street] is a legitimate alternative
18 destination for these customers.” Motion at 4. Not so. It appears SAP’s damages theory rests
19 simply on the premise that if Oracle would have lost sales even in the absence of
20 *TomorrowNow’s* alleged infringement, Oracle is unable to prove the lost profits that would
21 “have accrued *but for the defendant’s infringement*.” There is no support for the theory that a
22 copyright owner may recover lost profits damages “but for” the existence of *any non-party* who
23 it may establish infringes.

24 Accordingly, Oracle is not permitted to use hypothetical damages theories in its suit
25 against SAP to see how many other possible copyright infringement cases it can establish. To
26 the extent a plaintiff can establish that non-parties infringe its copyrights, the plaintiff has an
27 adequate remedy: it can bring lawsuits against such entities and seek damages caused by such
28 third party infringement in those suits. Absent that, whether a non-party infringes simply has

1 nothing to do with the damages owed by a defendant. Thus, the legality of Rimini Street's
2 operations is not relevant here.

3 * * *

4 Because discovery concerning the legality of Rimini Street's operations is wholly
5 irrelevant — as the parties agree, and as compelled by copyright case law — Oracle's motion to
6 compel should be denied. *See Cacique*, 169 F.3d at 622-23.

7 **C. Even if Some Level of Relevance Could Be Established, the *Micro Motion***
8 **Decision Compels Rejecting Oracle's Attempt to Try Rimini Street *In***
***Absentia* in the SAP Litigation**

9 As discussed in Section III.B above, discovery into whether a non-party infringes is
10 wholly irrelevant to copyright damages. However, even if some relevance could be shown,
11 discovery will not be permitted if the harm to the person from whom the discovery is sought
12 outweighs the need of the party seeking the discovery. *See* Fed. R. Civ. P. 26(b)(1); *Micro*
13 *Motion*, 894 F.2d 1323. In a number of analogous situations, courts have precluded discovery
14 seeking confidential information regarding non-party competitors. *See id.* at 1324-28.¹¹

15 The Federal Circuit's decision in *Micro Motion* is instructive. Like Oracle here, the
16 plaintiff *Micro Motion* sought discovery from a non-party (K-Flow) claiming whether it
17 infringed was relevant to rebutting the defendant's defense to a lost profits damages theory.¹²

18
19 ¹¹ *See also Katz*, 984 F.2d at 424-25 (citing *Micro Motion* and holding that the subpoenaed
20 information from a non-party was not relevant to the pending litigation); *Am. Metal Prods. Co. v.*
21 *Gutter Topper, Ltd.*, No. M 8-85, 1997 WL 666291, at *1-2 (S.D.N.Y. Oct. 24, 1997) (citing
22 *Micro Motion* and denying a motion to compel claiming relevance based on lost profits
23 argument); *Fort James Corp.* 1998 WL 709813, at *2 (citing *Micro Motion* for the principles
24 that a damages theory for lost profits and a protective order between the main parties is not
25 sufficient to establish that the documents requested of a non-party are relevant to the pending
26 litigation); *Heraeus Inc. v. Solar Applied Material Tech. Corp.*, No. 06-01191, 2006 WL
27 2067859, *2 (N.D. Cal. July 24, 2006) (citing *Micro Motion* and holding that "the potential
28 relevance on which [plaintiff] relies is too speculative, ill-defined, and tangential to support
discovery of critical competitive information of this nature from a non-party competitor");
Trading Techs. Int'l, Inc. v. eSpeed, Inc., No. 04 C 5312, 2006 WL 3541933, at *1-2 (N.D. Ill.
Dec. 5, 2006) (same).

¹² Notably, the *Micro Motion* case involved a **patent** infringement claim, not a copyright
claim. Under the applicable law concerning lost profits damages in patent cases, courts have
recognized the potential relevance of whether there were acceptable "noninfringing" substitutes
to the patented product. *See Micro Motion*, 894 F.2d at 1322. Thus, unlike the SAP Litigation,
which involves a **copyright** claim, in *Micro Motion* there was at least a plausible argument that
(continued...)

1 *See Micro Motion*, 894 F.2d at 1322-23. Through its subpoena, Micro Motion sought
2 confidential technical information from the non-party, including information regarding the
3 “configuration and operation” of each of the non-party’s competing products, as well as
4 documents relating to “comparisons of” the non-party’s products to those of the plaintiff and
5 defendant, hoping to establish that the non-party infringed. *Id.* at 1320-21, 1327. The non-
6 party’s motion to quash was denied in relevant part by the district court. *Id.* at 1321. On appeal,
7 the Federal Circuit reversed the denial, holding that Micro Motion had failed to establish the
8 relevance of the requested information. In a detailed analysis, the court addressed many of the
9 same issues present in the instant case:

10 First, as further discussed in Section IV *infra*, the Federal Circuit rejected the argument
11 by Micro Motion (similar to Oracle’s argument here) that the protective order entered into by the
12 plaintiff and defendant obviated the non-party’s objections to discovery, holding that a
13 “protective order is not a substitute for establishing relevance or need.” *Id.* at 1325. The Federal
14 Circuit reasoned that any confidential information supplied by the non-party to the competitor
15 parties would be at risk, especially because the non-party would have no means to control or
16 enforce the terms of the protective order. *Id.*

17 Next, the Court held that a possible lost profits damages theory did not make relevant
18 discovery regarding the non-party. *Id.* at 1325-27 (“Micro Motion’s assertion of a claim for
19 damages or even lost profit damages in itself does not provide a mantle of relevancy with respect
20 to all of the information it sought from K-Flow.”). The court held that if the plaintiff’s lost
21 profits damages theory were sufficient to justify discovery into whether a non-party infringes, a
22 plaintiff “could, in virtually every infringement suit, immediately obtain discovery from all
23 possible competitors by merely filing a complaint asking for damages against one.” *Id.* at 1324-
24 25.

25 _____
26 (...continued from previous page)
27 discovery into whether a non-party competitor infringes should be allowed as part of damages
28 discovery. Thus, any *patent* cases *permitting* discovery into whether a third party infringes are
distinguishable, as there is at least a possible argument for relevance in such cases.

1 The Court further reasoned that if Micro Motion brought a suit directly against the non-
2 party “on a mere suspicion of infringement,” discovery would not be allowed without more. *Id.*
3 at 1327. The Court rejected Micro Motion’s argument that discovery might **uncover** a legitimate
4 claim, holding that “discovery rules are designed to assist a party to prove a claim it reasonable
5 believes to be viable **without discovery**, not to find out if it has any basis for a claim.” *Id.*
6 (emphasis in original). The Court noted that the mere fact that the non-party was in the same
7 business as the plaintiff at best provided plaintiff with some suspicion of infringement, but it was
8 insufficient to justify intrusive discovery into that subject matter. *Id.* Because the plaintiff in
9 *Micro Motion* did not have a valid Rule 11 basis for alleging infringement, it was not entitled to
10 use the vehicle of a non-party subpoena to obtain discovery for purposes of determining whether
11 or not there was infringement. *Id.*

12 Just as the plaintiff in *Micro Motion* was not permitted to pursue discovery regarding
13 alleged infringement by a non-party to rebut a speculative damages theory it claimed the
14 defendant would assert, here too Oracle should not be permitted to conduct such discovery. Nor
15 should Oracle be permitted intrusive discovery based merely on its apparent “suspicion of
16 infringement” — consisting of such “evidence” as the fact that Rimini Street offers its services at
17 a discount, or innocuous statements by Ravin to the effect that the general services previously
18 offered by TomorrowNow (which have not even been found to infringe in the underlying
19 litigation) are similar to the current offerings of Rimini Street. *See* Motion at 4, 13:15; *cf.* Ravin
20 Decl., ¶¶ 9-10.

21 Because Oracle should not be permitted to “engage in merely speculative inquiries in the
22 guise of relevant discovery,” *Micro Motion*, 894 F.2d at 1328, Oracle’s motion should be denied.

23 **D. Oracle’s Requests Should Be Denied As Improper Pre-Litigation Discovery**

24 Oracle’s Motion should be denied for the additional reason that the requests are seeking
25 improper pre-litigation discovery.

26 As noted in Section II.C above, Oracle executed its subpoenas for Ravin and two other
27 Rimini Street executives **the very same day** that Oracle concluded discussions with Rimini Street
28 aimed at obtaining information for a possible claim against Rimini Street. Given this timing, it is

1 apparent that Oracle served the requests in the SAP Litigation not for use in that action, but for
2 the improper purpose of fishing for information Oracle hoped it could use in a separate action
3 against Rimini Street. Even if Oracle were able to establish some degree of relevance (which it
4 cannot), the Court should not allow Oracle to use the discovery rules to solicit pre-complaint
5 discovery from the Non-Parties.

6 “The discovery rules are designed to assist a party to prove a claim it reasonably believes
7 to be viable without discovery, not to find out if it has any basis for a claim.” *Micro Motion*, 894
8 F.2d at 1327; Fed. R. Civ. P. 26(b)(1). “[I]n a circumstance involving direct competitors, caution
9 must be used in pre-litigation discovery devices to limit the potential that discovery directed to
10 non-parties is used for the improper purpose of obtaining proprietary information of the
11 competitor.” *Ultimate Timing LLC v. Simms*, No. 3:09-mc-6RLYWGH, 2009 WL 1148056, at
12 *2 (S.D. Ind. Apr. 28, 2009) (granting motion to squash a subpoena where plaintiff sought
13 discovery from a non-party competitor in a patent matter where the plaintiff had sent the non-
14 party “cease and desist letters” and accused the non-party of infringement).

15 Here, as in *Ultimate Timing*, Oracle’s pre-litigation discovery should be prohibited.
16 Oracle and Rimini Street are direct competitors. Oracle has exchanged correspondence with
17 Rimini Street suggesting that Oracle may be interested in investigating, and possibly pursuing, a
18 potential claim against Rimini Street. *See* Sections I, II.C, *supra*. The timing of the initial Ravin
19 subpoena is telling evidence that Oracle is merely using the SAP Litigation as a vehicle to pursue
20 discovery for another purpose. Given these facts, and given that Rimini Street is not adequately
21 protected by the protective order between Oracle and SAP (as further discussed below), Oracle’s
22 attempt to obtain improper pre-litigation discovery should be denied.

23 **E. Oracle’s Specific Requests Are Not Relevant to the Underlying Litigation,**
24 **and Are Proprietary and/or Burdensome**

25 As discussed above, the legality of Rimini Street’s services — Oracle’s stated line of
26 relevance in the Motion — is not germane to any issue in the SAP Litigation as a general matter.
27 Accordingly, to the extent that — as Oracle contends — each of Oracle’s discovery requests is
28 deemed to relate to the legality of Rimini Street’s services, then the requests are all irrelevant.

1 Nonetheless, even when each of the discovery requests at issue here is analyzed on its own
 2 merits (or lack thereof), it is even more apparent that the requests (a) are irrelevant, (b) are
 3 unduly burdensome, and/or (c) seek proprietary and trade secret information. As such, the
 4 requests should be denied under Fed. R. Civ. P. 26(b)(1). *See Micro Motion*, 894 F.2d at 1326-
 5 27.

6 **1. Document Request No. 1: The Details of Rimini Street's "Business**
 7 **Model" Are Not Relevant, Are Incredibly Burdensome, and Involve**
 8 **Rimini Street's Core Trade Secrets**

9 Oracle has failed to establish the relevance of the first request for "documents sufficient
 10 to show Rimini Street's business model." Oracle's sole relevance argument is its assertion that
 11 Defendants have "thrust" Rimini Street's business model into the damages question related to the
 12 underlying litigation, and that SAP's damages theory fails if Rimini Street operates in the "same
 13 infringing way" as TomorrowNow. Motion at 12. As discussed above, whether Rimini Street
 14 infringes is not relevant. Nor is it clear how discovery into Rimini Street's "business model"
 15 will provide evidence relating to the alleged infringement.¹³

16 Depending on how one interprets this request, there are also additional relevance, burden,
 17 and trade secret problems.¹⁴

18 ¹³ Oracle quotes snippets from an interview in which Ravin makes general comparisons of
 19 the services offered by TomorrowNow and Rimini Street. *See Motion* at 13. Nothing in these
 20 quotations — or any other evidence cited by Oracle — even begins to suggest that Rimini Street
 21 is engaged in any infringing activities. *See Ravin Decl.*, ¶ 5.

22 ¹⁴ Oracle does not define "business model" in the Rimini Street subpoena. It could be
 23 interpreted in at least a couple of different ways:

- 24 • One definition of "business model," available from a leading online dictionary site,
 25 provides: "[A] design of the operations of a business which focuses on how revenue
 26 will be generated . . . Example: A restaurant's business model is to make money by
 27 cooking and serving food to hungry customers." Levin Decl., Ex. X
- 28 • Oracle provided a different — and likely overbroad — definition of "Business
 Model" as part of the document requests accompanying the Ravin subpoena (which
 requests are not at issue in the Motion):
 any framework for creating economic, social, and/or other forms of value,
 including a broad range of informal and formal descriptions to represent core
 aspects of a business, including purpose, offerings, strategies, infrastructure,
 organization structures, trading practices, and operational processes and policies;
 and the method of doing business by which a company can sustain itself and
 generate revenue.

(continued...)

1 Under a narrower definition of “business model” (*see* note 14 *supra*), Rimini Street
2 submits that the materials produced by Rimini Street,¹⁵ and the testimony provided by the Rimini
3 Street witnesses, are “sufficient to show” generally how Rimini Street provides its services and
4 “how revenue [is] generated.”¹⁶ As such, Rimini Street has complied with this request, and there
5 is nothing to compel.

6 Under a broader definition of business model, Oracle’s request is clearly overbroad and
7 unduly burdensome. While the “sufficient to show” limitation would ordinarily circumscribe a
8 request, in the context of a subjective, non-quantifiable concept like a “business model,” it is
9 unclear what would be “sufficient.” If Rimini Street is required to provide documents
10 adequately describing every single aspect of its “infrastructure,” its “processes,” and its
11 “policies,” among other aspects of Oracle’s broad definition, this would be a herculean effort.
12 Given that Rimini Street has nearly one hundred and fifty employees located around the world,
13 and provides a wide range of services to each of its more than two hundred customers, each of
14 whom receives unique deliverables, providing documents “sufficient to show” Rimini Street’s
15 “infrastructure,” “processes,” and “policies” would also impose an enormous and undue burden
16 on Rimini Street. Ravin Decl., ¶ 12.

17 The request is separately objectionable because it calls for Rimini Street’s most
18 confidential and proprietary trade secrets. To the extent the request requires Rimini Street to

19 _____
20 (...continued from previous page)

21 Russell Decl., Ex. K at 4. Oracle’s definition appears to be taken from an entry from
22 the Wikipedia web site, an on-line, user-edited encyclopedia. *See* Levin Decl., Ex. Y

23 ¹⁵ Oracle asserts that by agreeing to provide documents in response to this request, Rimini
24 Street “acknowledged that its business model is relevant to some extent.” *See* Motion at 13:9.
25 Nonsense. Rimini Street served written objections to the requests, which included relevance
26 objections. *See* Levin Decl., Ex. M. Producing some discovery subject to one’s objections in the
27 hopes of avoiding a discovery dispute does not waive one’s objections, or constitute an
28 “acknowledge[ment]” as to relevance.

¹⁶ *See, e.g.,* Russell Decl., Ex. F at RS-ORACLE 0012-13 (describing, among other things,
how Rimini Street provides full 24x7x365 support on various listed product lines, including fixes
and tax and regulatory updates, support for customizations, a more responsive level of service,
no requirement of upgrades, all at prices that save clients at least 50% on annual support costs
compared to Oracle Annual Support); *see also, e.g.,* Levin Decl., Ex. Z (Ravin Tr.) at 200:11-20,
203:2-204:10 (generally describing the services Rimini Street offers to generate revenue).

1 define each of its “strategies,” describe its entire “infrastructure,” and catalogue at a detailed
2 level its many “operational processes” (among other things), this request goes to the heart of
3 Rimini Street’s trade secrets. The proprietary details of how Rimini Street generates its revenue
4 are precisely what provides Rimini Street with its competitive advantage. Rimini Street has gone
5 to great lengths to protect these trade secrets, in which it has invested substantial money and
6 resources, and requiring Rimini Street to turn over such information to Oracle and SAP could
7 substantially harm Rimini Street. Ravin Decl., ¶ 13. As a competitor to both Oracle and SAP,
8 Rimini Street should not be required to produce its confidential and proprietary business and
9 technical documents, especially given the lack of relevance. Speculation as to what defendants
10 may argue at trial regarding damages is not enough to warrant such intrusive discovery of a
11 competitor. *See Micro Motion*, 894 F.2d at 1328; *see also Trading Techs. Int’l*, 2006 WL
12 3541933, at *2.¹⁷

13 **2. Document Request No. 2: Rimini Street’s Automated Software Tools**
14 **Are Not Relevant, And Are Potentially Proprietary And Burdensome**

15 In its Motion, Oracle has provided no argument — let alone any factual or legal basis —
16 to demonstrate how documents relating to Rimini Street’s “automated tools” are supposedly
17 relevant to the underlying litigation. *See Motion* at 11-14 (lacking even a mention of “automated
18 tools”). As Oracle has failed to meet its burden under Federal Rule of Civil Procedure 45(c)(3)
19 with respect to Oracle’s second document request to Rimini Street, this request should be
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21

22
23 ¹⁷ Although unclear what this has to do with Rimini Street’s “business model,” the first
24 document request additionally purports to seek information regarding “whether Rimini Street
25 currently relies or ever has relied on copies of customer’s licensed Oracle software to provide
26 software support.” Rimini Street submits that this information is irrelevant for the reasons
27 discussed in Section III. B & C, as it is propounded for the purpose of exploring whether Rimini
28 Street may be infringing Oracle’s copyrighted works. Moreover, even if the legality of Rimini
Street’s offerings were relevant (and it is not), whether or not Rimini Street relies on Oracle’s
copyrighted works to service customers — who are permitted to authorize third parties such as
Rimini Street to use such works — does not establish copyright infringement, and therefore the
requested information could not be used to determine whether there is infringement.

1 denied.¹⁸ See *Katz*, 984 F.2d 422, 424-25; *Nugget Hydroelectric*, 981 F.2d at 438-39; *Fort*
2 *James Corp.*, 1998 WL 709813, at *2.

3 Were Oracle to have argued that this request is relevant to whether Rimini Street's
4 services are infringing (and it is not clear how it relates to this), as discussed above, whether
5 Rimini Street infringes is simply not relevant to the damages SAP potentially owes. And to the
6 extent this request seeks information concerning proprietary internal software tools and
7 processes, Rimini Street maintains the confidentiality of its internal software tools and processes,
8 which are valuable trade secrets of the company. Ravin Decl., ¶ 14. To the extent the request
9 calls for discovery concerning every time Rimini Street has used any software tools for the
10 benefit of a customer, this request could additionally be very burdensome, as Rimini Street
11 provides customized deliverables and services to each of its hundreds of customers. *Id.* Sharing
12 proprietary and potentially burdensome Rimini Street trade secrets with Rimini Street's two
13 principal competitors would impose an undue burden on Rimini Street and cause potentially
14 significant loss of value in Rimini Street's proprietary know-how, Ravin Decl., ¶¶ 11-17, and
15 should not be permitted.

16 **3. Document Request No. 3: Rimini Street's "Checklists" Are Irrelevant**
17 **and Potentially Proprietary and Burdensome**

18 Oracle has also failed to provide a factual or legal basis to support how the requested
19 "checklists" are relevant to the underlying litigation. Similar to its argument concerning Rimini
20 Street's business model, Oracle relies only on speculation to support its contention that the
21 checklists are relevant. Oracle claims that the checklists "may" reveal certain information that
22 could be relevant to whether Rimini Street is infringing Oracle's copyrights. Motion at 12.
23 Despite the fact that any alleged infringement by Rimini Street is not relevant to the underlying
24 litigation, the possibility that the checklists "may" identify some speculative occurrence is not
25

26 ¹⁸ Rimini Street notes that Oracle should not be permitted to address in its Reply Brief this
27 topic — or any other topic — not addressed in Oracle's opening brief, as Rimini Street will not
28 have an opportunity to respond.

1 enough to support Oracle's argument that the checklists are relevant.¹⁹ *See Micro Motion*, 894
2 F.2d at 1326-27.

3 Additionally, Rimini Street's proprietary processes used to develop, test, package and
4 deliver its services are company trade secrets, and are critical to Rimini Street's competitive
5 advantage. Ravin Decl., ¶ 15; Declaration of Beth Lester ("Lester Decl.") ¶¶ 9-10. Rimini Street
6 offers a competitive advantage over Oracle and other competitors because it is able to
7 consistently release to its customers new tax and regulatory updates *before* Oracle and other
8 competitors are able to do so, and with what many clients believe is higher quality. Ravin Decl.,
9 ¶¶ 5, 15. It is therefore not surprising Oracle would want to obtain discovery into those
10 processes.

11 Moreover, to the extent this request calls for *all* checklists or "*other documents*" used to
12 track the development, testing, documentation, packaging, or delivery of tax updates, this would
13 encompass a massive volume of materials over a long time span, and would be burdensome to
14 collect. Lester Decl., ¶¶ 6-7.

15 Balanced against the complete lack of relevance, Oracle's unduly burdensome request for
16 these highly proprietary documents should be denied. *See Micro Motion*, 894 F.2d at 1325.

17 **4. The Further Deposition Testimony Oracle Seeks From Ravin Is Not**
18 **Relevant to the Underlying Litigation, Is Highly Proprietary, and**
Could Open the Door to Additional Burdensome Discovery

19 Nor should Oracle be permitted to re-open the Ravin deposition to pursue its suspicions
20 of alleged infringement against Rimini Street. The parties already spent approximately seven
21 hours deposing Ravin on May 21, 2009. Levin Decl., ¶ 31, Ex. S. During that time, in addition
22 to providing testimony regarding his time at TomorrowNow, Ravin provided substantial

23
24 ¹⁹ Incredibly, Oracle suggests Rimini Street waived its objections to the requests for
25 checklists at Beth Lester's deposition. Motion at 13:1-4. Not so. Allowing Ms. Lester to
26 provide generalized foundational testimony as to the likely *existence* of a class of documents is
27 not a concession the documents are relevant, or that Rimini Street has waived confidentiality
28 objections regarding the documents themselves. Indeed, failure to object to relevance at a
deposition does not waive the objection. *See* Fed. R. Civ. P. 32(d)(3)(A) ("An objection to . . .
relevance . . . is not waived by a failure to make the objection before or during the deposition,
unless the ground for it might have been corrected at that time."); *In re Stratosphere Corp.*
Securities Litig., 182 F.R.D. 614, 618 (D. Nev. 1998).

1 testimony concerning Rimini Street, notwithstanding its irrelevance. For example, Ravin
2 testified as to the number of customers Rimini Street has, the number of support personnel, the
3 product lines it supports, the types of services it offers, the number of former TomorrowNow
4 customers it supports, among other things. Levin Decl., Ex. Z. Even if Judge Laporte's
5 statement that "some" Rimini Street testimony "may be relevant" (*see* 13 *supra*) were controlling
6 here, Ravin has already provided sufficient testimony.

7 Nonetheless, Oracle now seeks an additional two hours to further question Ravin on the
8 details of Rimini Street's business model, the technical operation of Rimini Street, Rimini
9 Street's development and testing environments, and Rimini Street's intellectual property policies,
10 as well as unspecified follow-up questions "flowing" from Ravin's answers. Motion at 14. As
11 demonstrated *supra* at 9-20, this information — which is being sought for the purposes of
12 exploring whether Rimini Street infringes Oracle's copyrights — is irrelevant, and constitutes
13 improper pre-litigation discovery. As such, further testimony should not be ordered. *See Micro*
14 *Motion*, 894 F.2d at 1328 (quashing deposition subpoena seeking information regarding non-
15 party's infringement). Moreover, as discussed in Sections III.E.1-3 above, inquiries into Rimini
16 Street's technical operations get at Rimini Street's highly confidential technical information and
17 other trade secrets, and should therefore not be permitted. *See Micro Motion*, 894 F.2d at 1328.

18 While two additional hours of testimony may not be burdensome on its own, to the extent
19 this court allows Oracle to conduct the Discovery, SAP has already indicated that it needs to be
20 permitted to conduct follow-up discovery. Once this door has been opened, Rimini Street is
21 skeptical that the parties will be satisfied that the issue of alleged infringement — which has
22 been the subject of more than 300 hours of deposition testimony of TomorrowNow witnesses in
23 the SAP Litigation — can be fully explored within reasonable limits. *See* Levin Decl. Ex. G.
24 Allowing such further discovery could result in the "quagmire" of multiple "mini-infringement
25 trials on each competing product" that the *Micro Motion* court warned against. *See Micro*
26 *Motion*, 894 F.2d at 1324. As the *Micro Motion* court further noted, the "doors of the discovery
27 process may not be so easily opened." *Id.* at 1325.

1 **IV. THE PROTECTIVE ORDER IN THE UNDERLYING LITIGATION BETWEEN**
2 **ORACLE AND SAP IS NOT A SUBSTITUTE FOR ESTABLISHING**
3 **RELEVANCY FOR FURTHER NON-PARTY DISCOVERY, AND IS IN ANY**
4 **EVENT INADEQUATE**

5 Oracle would have this Court believe that Rimini Street should not be concerned about
6 producing the Discovery because there is an adequate protective order in place in the SAP
7 Litigation. *See* Motion at 9, 13-14. That is not the case.

8 As a preliminary matter, as the Ninth Circuit held in the *Cacique* case, a protective order
9 “does not absolve [plaintiff] from showing that the information sought is relevant.” *Cacique*,
10 169 F.3d at 622-23. Rather, a protective order’s purpose “is to prevent harm by limiting
11 disclosure of *relevant and necessary* information.” *Id.* (emphasis in original) (citation omitted);
12 *see also Micro Motion*, 894 F.2d at 1325. Accordingly, Rimini Street submits that it should not
13 be required to produce the Discovery under *any* protective order, regardless of the safeguards
14 built into it.

15 To the extent this Court concludes that at least some further confidential Rimini Street
16 information should be disclosed, Rimini Street submits that, for a number of reasons, the
17 protective order in place in the litigation between Oracle and SAP is wholly inadequate to protect
18 Non-Party Rimini Street’s interests.

19 First, the parties to the protective order are Oracle and SAP, Rimini Street’s two principal
20 competitors, and Rimini Street has no standing to enforce the order. As noted by the Federal
21 Circuit in *Micro Motion*:

22 It would be divorced from reality to believe that either party here would serve as
23 the champion of its [non-party competitor] either to maintain the confidentiality
24 designation or to limit public disclosure as much as possible during trial. [The non-
25 party] would, in fact, lose all control of the situation since disclosure of its
26 information depends on the action by a court before whom it has no standing.

27 894 F.2d at 1325; *see also Fort James Corp.*, 1998 WL 709813, at *2. Thus, the protective order
28 hardly provides Rimini Street with any comfort that any valuable trade secrets it might produce
will be protected. Unless the protective order could be modified so that Rimini Street could be
given full knowledge as to how its materials are being used, and an opportunity to oppose such
usage, the protective order will not afford Rimini Street with the necessary protections.

1 Second, the current protective order does not allow a party to designate information so
2 that Oracle or SAP employees may not have access to it. Rather, it provides that Oracle and SAP
3 may each designate two in-house attorneys who have direct access to even materials designated
4 “Highly Confidential,” such as trade secrets. *See* Russell Decl., Ex. N at 7.

5 The first Oracle employee with access to such materials is Dorian Daley, Oracle’s Senior
6 Vice President, General Counsel, and Secretary. The other individual Rimini Street understands
7 to be covered under the order was one of the attorneys involved in the discussions that took place
8 between Oracle and Rimini Street, Levin Decl., ¶ 34, and would thus likely be involved in
9 deciding whether to pursue any future potential action against Rimini Street. Providing such
10 Oracle representatives with access to Rimini Street’s highly confidential information would
11 enable Oracle to use such information for purposes other than the SAP Litigation. In its Motion,
12 far from assuring the court that Oracle’s counsel would not use materials obtained in the SAP
13 Litigation for any other purpose, Oracle’s counsel instead states that it should be entitled to the
14 Discovery “regardless of where else that discovery might lead.” Motion at 5:6.²⁰

15 When the parties met and conferred to discuss these discovery issues, Oracle refused to
16 preclude its in-house counsel from viewing Rimini Street’s highly confidential documents. *See*
17 Levin Decl., ¶ 34. As such, any confidential information supplied by Rimini Street to its
18 competitors — Oracle and SAP — would be at risk, especially because Rimini Street would have
19 no means to control or enforce the terms of the protective order in a suit where it is not a party.

20 Contrary to Oracle’s suggestion, *see* Motion at 9, 14, Judge Laporte has not ruled on —
21 much less “rejected” — Rimini Street’s arguments concerning the adequacy of the protective

22
23
24 ²⁰ After Ravin testified at his deposition as to the names of Rimini Street’s confidential
25 investors (Rimini Street is a private company that does not publicly disclose such information),
26 Ravin’s counsel requested that Oracle voluntarily agree not to share with its in-house counsel
27 this information, which could not possibly have any relevance even under the arguments Oracle
28 asserts in this Motion. Levin Decl., ¶ 34 & Ex. AA. Oracle refused. *Id.* ¶ 35. Rimini Street
submits that this refusal to forego sharing with its in-house counsel even the irrelevant names of
Rimini Street’s investors raises red flags suggesting Oracle should not be trusted to use any
confidential Rimini Street discovery it obtains solely for purposes of the SAP Litigation.

1 order.²¹ When the issue of the protective order (which had not been briefed) came up at the
2 discovery conference, Judge Laporte stated: “I haven’t thought about [it] and that was just raised
3 today and I don’t have any particular position on that.” Levin Decl., Ex. S at 18:21-23. Judge
4 Laporte concurred with counsel for Ravin that any issues concerning the protective order were
5 not yet ripe for review. *Id.* at 19:4-7. Judge Laporte further stated that she was “not prejudging
6 the issue” at that time. *Id.* at 20:5. In her order following the conference, while Judge Laporte
7 speculated that issues concerning confidentiality “may” be satisfied by the existing protective
8 order, she ordered that the parties should “meet and confer” regarding Ravin’s confidentiality
9 concerns, as the issue had not yet ripened. *See* Russell Decl., Ex. M at 2.

10 Given the inadequacy of the existing protective order, Rimini Street respectfully submits
11 that any further discovery required under the subpoenas should be produced under an amended
12 protective order which would, at a minimum: (a) prohibit in-house attorneys at Oracle or SAP
13 from having access to Highly Confidential Rimini Street materials, such as those sought by the
14 Discovery; (b) provide Rimini Street with advance notice, and an opportunity to object, to the
15 extent any party intends to use any of the Rimini Street confidential materials in any pleading or
16 at any hearing, or otherwise disclose such materials; and (c) preclude the use in open court of any
17 Rimini Street confidential materials.

18 **V. NON-PARTIES ARE ENTITLED TO REIMBURSEMENT OF COSTS AND**
19 **ATTORNEY’S FEES IN OPPOSING THIS MOTION**

20 Rimini Street requests that this Court additionally order Oracle to reimburse Rimini
21 Street for the attorney’s fees and expenses it has been forced to expend in opposing Oracle’s
22 abusive and intrusive non-party discovery requests, as authorized by the Federal Rules.

23 Federal Rule of Civil Procedure 37(a)(5)(B) provides:

24 If the motion [to compel] is denied, the court . . . must, after giving an opportunity
25 to be heard, require the movant . . . to pay the party or deponent who opposed the
motion its reasonable expenses incurred in opposing the motion, including

26 ²¹ Indeed, as discussed above with the relevancy issue, Judge Laporte properly recognized
27 that any issues related to a Nevada subpoena (such as Ravin’s deposition) would need to be
28 decided by the Nevada Court, not the California Court. *Id.* at 22:10-12.

1 attorney's fees. But the court must not order this payment if the motion was
2 substantially justified or other circumstances make an award of expenses unjust.

3 A motion to compel is not "substantially justified" where "the vast bulk of legal authority
4 [i]s against [the movant's] position, and there are no circumstances evident which would make
5 an award of expenses unjust." *Pearce v. Club Med Sales, Inc.*, 172 F.R.D. 407, 411 (N.D. Cal.
6 1997); *see also Cram v. Elec. Data Sys. Corp.*, No. 07cv1842, 2008 WL 115438, at *1-2 (S.D.
7 Cal. Jan 25, 2008). When a motion to compel is made in bad faith or is not warranted by law, an
8 award of attorneys' fees under Rule 37(a)(5)(B) is not unjust. *See In re Shubov*, 253 B.R. 540,
9 549-50 (9th Cir. B.A.P. 2000).

10 Here, an award of fees is appropriate. As the court in *Micro Motion* recognized, the
11 possibility that non-party discovery regarding infringement could be abused to "harass a
12 competitor" is readily apparent. *Micro Motion*, 894 F.2d at 1324-25. Rimini Street respectfully
13 submits that, in light of the facts and circumstances of this case, including the timing of the
14 Ravin subpoena, *see* Section II.C *supra*, Oracle's requests were made for the improper purpose
15 of intimidating a far smaller competitor with less financial resources than Oracle, attempting to
16 learn valuable trade secret information about Rimini Street's successful business model and
17 operations, and trolling for evidence of infringement against a competitor.

18 Moreover, Oracle has failed to demonstrate how its requests are relevant to the
19 underlying litigation. Indeed, on at least two occasions, Oracle conceded that information
20 concerning Rimini Street is not relevant to the underlying litigation (and has further attempted to
21 preclude Rimini Street from obtaining some of these admissions), yet it now disingenuously
22 bases its Motion on the purported relevance of this information. *See supra* at 9-11.

23 In addition, Oracle has mischaracterized statements made by the California court
24 regarding the relevancy of the Discovery. *See supra* at 12-14. Oracle has further
25 mischaracterized the positions taken by SAP concerning the Discovery. *See supra* at 11-12.
26 Finally, Oracle has not cited a single authority supporting its entitlement to the Discovery based
27 on a theory of lost profits copyright damages. *See Motion* at 11-14.
28

1 For the foregoing reasons, Non-Parties respectfully submit they are entitled to
2 reimbursement of costs and attorney's fees from Oracle. *See* Fed. R. Civ. P. 37(a)(5)(B);
3 *Pearce*, 172 F.R.D. at 411; *Shubov*, 253 B.R. at 549-50.

4 **VI. CONCLUSION**

5 Oracle's attempt to obtain pre-complaint discovery into the proprietary trade secrets of
6 Non-Party Rimini Street — fishing for hoped-for evidence of copyright infringement based on
7 nothing more than its own speculation and innuendo — should be denied because it is
8 undisputedly irrelevant and because it is highly intrusive. For the foregoing reasons, Non-Parties
9 Rimini Street and Ravin respectfully request that the Court deny Oracle's Motion to Compel and
10 award Non-Parties their attorney's fees and costs in opposing the Motion.

11
12 Dated: September 14, 2009

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

13
14 By: /s/ Michael B. Levin
MICHAEL B. LEVIN

15
16 Attorneys for Non-Parties
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Attorneys for Non-Parties
 SETH RAVIN AND RIMINI STREET INC.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORACLE USA, INC, a Colorado)	CASE NO.: 2:09-CV-01591 KJD (GWF)
Corporation, <i>et. al.</i> ,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
SAP AG, a German corporation, <i>et. al.</i> ,)	
)	
Defendants.)	
)	

CERTIFICATE OF SERVICE

I am an employee at Wilson Sonsini Goodrich & Rosati. I certify that I served a copy of the foregoing on the 14th day of September 2009 via electronic service through the United States District Court for the District of Nevada's ECF System upon each party in the case who is registered as an electronic case filing user with the Clerk.

/s/ Michael B. Levin

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EXHIBIT J

BOIES, SCHILLER & FLEXNER LLP

1999 HARRISON STREET • SUITE 900 • OAKLAND, CA 94612 • PH. 510.874.1000 • FAX 510.874.1460

By Email and US Mail

January 28, 2010

Jonathan M. Jacobson, Esq.
Michael B. Levin, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

Re: *Oracle USA, Inc. and Oracle International Corporation v. Rimini Street, Inc. and Seth Ravin*, No. 2:10-cv-00106 (D. Nev. filed Jan. 25, 2010)

Dear Messrs. Jacobson and Levin,

We are counsel to Oracle USA, Inc. and Oracle International Corporation (collectively, "Oracle") in the above-referenced matter, in which Rimini Street, Inc. and Seth Ravin are named as defendants. We understand that you represent Rimini Street and Mr. Ravin.

The purposes of this letter are to remind Rimini Street and Mr. Ravin that they are obligated to identify, retain and preserve relevant evidence; to request confirmation that they have done so since receiving the December 23, 2008 letter from Oracle's outside counsel; and to demand that they do so (or continue to do so) now that a complaint has been filed.

Oracle also recognizes the need for parties to comply with their preservation obligations while avoiding excessive burdens and disruption of their businesses. Accordingly, we propose that we meet with you to consider a reasonable, agreed-upon procedure and stipulation regarding preservation of documents and data that will ensure the preservation of relevant evidence in this case, with due consideration to the relative burdens on the parties. Please contact me to begin that discussion.

In the meantime, Oracle demands that Rimini Street and Mr. Ravin immediately take appropriate steps to identify, retain, and preserve documents, data, and other evidence, as well as electronic media in their possession or control that contain data, that

BOIES, SCHILLER & FLEXNER LLP

Jonathan M. Jacobson, Esq.

Michael B. Levin, Esq.

January 28, 2010

Page 2 of 2

are relevant to Oracle's claims and any defenses Rimini Street and Mr. Ravin may assert in this case. Oracle further demands that Rimini Street and Mr. Ravin avoid spoliation of relevant documents and data. Further, this letter is notice and demand that Rimini Street and Mr. Ravin put in place appropriate safeguards to prevent destruction of relevant data, including destruction caused by Rimini Street's or Mr. Ravin's policies related to retention or destruction of electronic data, including by the failure of Rimini Street employees to preserve potentially responsive data in systems under their control (e.g., home computers used for business).

We furthermore expect that Rimini Street and Mr. Ravin will institute these obligatory identification, retention and preservation efforts for documents and evidence under Rimini Street's or Mr. Ravin's control, custody or possession, regardless whether Rimini Street or Mr. Ravin currently has actual custody of the materials.

Please confirm that Rimini Street and Mr. Ravin have undertaken, or will immediately undertake, appropriate steps to identify, retain, and preserve relevant evidence and contact me to discuss a stipulated protocol for preservation of data and documents.

Very truly yours,

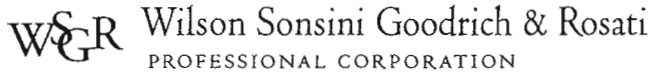

Fred Norton

cc:

James C. Maroulis

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EXHIBIT K



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February 6, 2010

VIA EMAIL AND FACSIMILE

Fred Norton, Esq.
Boies, Schiller & Flexner LLP
1999 Harrison Street
Suite 900
Oakland, California 94612

**Re: *Oracle USA, Inc. and Oracle Int'l Corp. v. Rimini Street, Inc. and Seth Ravin*
District Court of Nevada, Case No. 2:10-cv-106**

Dear Fred:

I write in response to your January 28, 2010 letter to Jon Jacobson and me concerning document preservation. Be assured that Rimini Street and Mr. Ravin take the issue of document preservation very seriously, and that appropriate measures are in place to preserve potentially relevant materials.

While your letter focuses on the obligations of Rimini Street and Mr. Ravin, you fail to provide any assurances that Oracle has taken measures to preserve its potentially relevant documents. By this letter, we similarly seek confirmation that Oracle will adopt reasonable measures to identify and preserve all materials potentially relevant to any claims, defenses or counterclaims anticipated to be litigated in this action.

Among other categories of information, Rimini Street expects that Oracle will preserve all materials relating to Oracle's websites, including use policies, usage monitoring, website design and strategy, and issues and complaints regarding the web site; communications and contracts with customers, vendors, and partners regarding support services for Oracle's software; communications and analyses relating to third-party support providers and competitors; all Oracle servers pertaining to the software at issue, including associated usage data, server incident reports, down-time logs, and access logs. It is of course impossible for Rimini Street to delineate all categories of potentially relevant information, and by listing certain categories above Rimini Street does not intend to suggest that Oracle's preservation obligations do not extend to other categories. We fully expect that Oracle will preserve *all* categories of information potentially relevant to the parties' dispute.

With respect to the types of materials that must be preserved, they include all manners of correspondence, documents, systems, databases, programs, and other relevant data. Oracle's obligations extend to materials whether in hardcopy or stored electronically on hard drives, servers, removable media, or PDAs. Further, we expect that Oracle has adopted appropriate

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

Fred Norton, Esq.
February 6, 2010
Page 2

safeguards to prevent any intentional or inadvertent modification, alteration, or destruction of potentially relevant materials by its employees or consultants either in their workplaces or elsewhere.

We look forward to Oracle's confirmation that it has undertaken suitable steps to preserve potentially relevant information. Once we have received your response, we will be happy to discuss a process for ensuring that both parties live up to their document preservation obligations.

Sincerely,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

A handwritten signature in black ink, appearing to read "Michael Levin", written in a cursive style.

Michael Levin

cc: Geoffrey M. Howard, Esq. (via email)

EXHIBIT L

BOIES, SCHILLER & FLEXNER LLP

1999 HARRISON STREET • SUITE 900 • OAKLAND, CA 94612 • PH. 510.874.1000 • FAX 510.874.1460

March 16, 2010

VIA E-MAIL & U.S. MAIL

Michael B. Levin, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

Re: *Oracle USA, Inc. and Oracle International Corp. v. Rimini Street, Inc. and Seth Ravin*, No. 2:10-cv-00106

Dear Mike,

I write to follow up once again on my efforts to meet and confer about an agreed protocol for the preservation of relevant evidence in this case, and to advise you that unless we are able to schedule a meet and confer to take place by Friday, March 19, plaintiffs intend to seek relief from the Court.

I have written to you several times to try to schedule a meet and confer session on this issue, dating back to January 28, 2010. I understand that Geoff Howard also raised this issue with you by telephone last Wednesday, and you informed him that by Friday, March 12, you would try to provide a date for us to speak. Still, we have heard nothing.

I remind you that in your letter to me on February 6, you professed that you would be “happy” to discuss document preservation. In that letter, you stated that Rimini Street and Mr. Ravin “take the issue of document preservation very seriously, and appropriate measures are in place to preserve potentially relevant materials.” Your letter also included a lengthy list of broad categories of evidence that you demanded that Oracle take “reasonable measures” to preserve, including evidence related to unspecified “defenses” and “counterclaims.”

Accordingly, I would expect that as of February 6, you were in a position to explain, at the very least, (1) the “appropriate measures” that Rimini Street and Mr. Ravin already had in place, (2) what further measures they intended to employ, and (3) the defenses and counterclaims that Rimini Street or Mr. Ravin expect to assert that might implicate Oracle documents. With the benefit of the past five weeks, I would expect that you would have even better information about what the defendants have done and what

BOIES, SCHILLER & FLEXNER LLP

Michael B. Levin, Esq.
March 16, 2010
Page 2 of 2

they will do. Nonetheless, each time we have asked for a meeting, you have found reason for delay.

We need to begin this discussion as soon as possible. It is in the interest of all the parties at least to explain the measures that they have each put in place thus far, identify the further measures that each believes are appropriate, and reach agreement to the extent we can. There is no reason why we cannot start discussing those matters now.

In short, we should talk, and we should not wait any longer to do so. Please respond by close of business tomorrow, March 17, with a date and time between now and Friday, March 19 when you – or some other attorney for defendants – will be available to discuss an agreed protocol for the preservation of evidence.

If we do not hear from you, or you refuse to schedule a meet and confer session on this issue before Friday, we will have no choice but to seek relief from the Court. If you wish to discuss scheduling by telephone, I am of course available to speak with you. As you know, my direct line is 510-874-1007.

I look forward to your prompt response.

Very truly yours,


Fred Norton

cc:
James C. Maroulis
Geoffrey M. Howard
Jonathan M. Jacobson

EXHIBIT M

BOIES, SCHILLER & FLEXNER LLP

1999 HARRISON STREET • SUITE 900 • OAKLAND, CA 94612 • PH. 510.874.1000 • FAX 510.874.1460

By E-mail & U.S. Mail

March 22, 2010

Michael B. Levin, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

Re: *Oracle USA, Inc. and Oracle International Corp. v. Rimini Street, Inc. and Seth Ravin*, No. 2:10-cv-00106 (D. Nev., filed Jan. 25, 2010)

Dear Mike,

Thank you for your letter of March 17. With respect to your request that we prepare a proposal, we need additional information to be able to ultimately enter into a stipulation. That is one purpose of the meet-and-confer process we have been seeking for some time. Consequently, it is not possible for Oracle to identify all of the categories of documents and data that defendants should be preserving. In the interim, however, here is a list of the items we would like Rimini Street and Ravin to confirm that they have retained or preserved and will continue to do so:

1. All files downloaded from any Oracle (as used here and below including PeopleSoft, JD Edwards, or Siebel) source;
2. All machines on which any downloads from any Oracle source are saved;
3. All versions of any tool used to download files from any Oracle source;
4. All machines used to download files from any Oracle source;
5. All logs reflecting downloads from any Oracle source;
6. All machines and electronic files for any employee involved in any downloading from any Oracle source;
7. Any machines on which customer and generic environments or sandboxes relating to any Oracle product were created or are maintained or preserved;
8. All copies of any Oracle software or support material obtained from any source;

BOIES, SCHILLER & FLEXNER LLP

Michael B. Levin, Esq.

March 22, 2010


Page 2 of 2

9. All machines on which any Oracle software or support material were created or are maintained or preserved;
10. All machines and electronic files for any employee receiving, copying, or distributing any Oracle software or support material;
11. All data sources and locations containing or including all (a) Rimini Street and Ravin's contracts and communications with any actual or prospective customer provided with any supporting relating to any Oracle product; (b) communications between Rimini Street and Oracle; (c) all communications among Rimini Street employees concerning the downloading or copying of any Oracle software or support materials; (d) material obtained directly or indirectly from TomorrowNow, Inc. (including any predecessor or successor); (e) Rimini Street and Ravin regular financial, cash flow, profit/loss, revenue, budget, and expense reports; and (f) communications regarding this litigation or Oracle's litigation with SAP;
12. All machines, documents and electronic files in Ravin's possession, custody, or control; and
13. Any database(s) or other tools used to track support for any Rimini Street customer.

We note that Oracle has undertaken extensive document preservation efforts on its own, consistent with the claims in this action, its role in the relevant events, and the size and nature of its operations.

We look forward to your confirmation that all materials in the above categories have been and will be preserved.

Very truly yours,

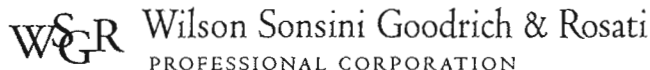


Fred Norton

cc:

James C. Maroulis
Geoffrey M. Howard
Jonathan M. Jacobson

EXHIBIT N



650 Page Mill Road
Palo Alto, CA 94304-1050
PHONE 650.493.9300
FAX 650.493.6811
www.wsgr.com

WRITER'S DIRECT DIAL 650.320.4929

March 17, 2010

VIA EMAIL

Fred Norton, Esq.
Boies, Schiller & Flexner LLP
1999 Harrison Street, Suite 900
Oakland, California 94612

**Re: Oracle USA, Inc. and Oracle Int'l Corp. v. Rimini Street, Inc. and Seth Ravin
District Court of Nevada, Case No. 2:10-cv-106**

Dear Fred:

I write in response to your March 16, 2010 letter concerning document preservation.

Rimini Street remains willing to dialogue regarding the parties' preservation issues. However, a meet-and-confer in the absence of any defined dispute and in the current pre-Answer timeframe is premature and likely inefficient. Nonetheless, from Rimini Street's perspective, the parties can certainly lay the groundwork so that any preservation issues can be resolved as quickly and efficiently as possible.

To that end, in your January 28 and February 11 letters, you propose that the parties enter into a stipulation setting forth an agreed-upon procedure regarding preservation of potentially relevant documents and data. Rimini Street suggests that Oracle provide its proposed written stipulation at its earliest convenience. Once Rimini Street has had a chance to evaluate Oracle's proposal, Rimini Street will provide proposed written modifications or additions. At that point, the parties can evaluate items of disagreement, if any, and meet and confer to resolve such disagreements.

I look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Levin'. The signature is fluid and cursive.

Michael Levin

cc: Geoffrey M. Howard, Esq. (via email)

EXHIBIT O



March 29, 2010

Robert H. Reckers

Via Email

Fred Norton, Esq.
Boies, Schiller & Flexner LLP
1999 Harrison Street, Suite 900
Oakland, California 94612

JPMorgan Chase Tower
600 Travis Street, Suite 1600
Houston
Texas 77002-2992
713.227.8008
713.546.5626 DD
713.227.9508 Fax
rreckers@shb.com

Re: *Oracle USA, Inc. and Oracle International Corp. v. Rimini Street, Inc. and Seth Ravin*, No. 2:10-cv-00106 (D. Nev., filed Jan 25, 2010)

Dear Mr. Norton:

Thank you for your letter of March 22, 2010 to Mr. Michael Levin. Your list of categories, while extremely broad, is duly noted. Based on the extensive preservation efforts and investigation to date, Defendants Ravin and Rimini Street are preserving information consistent with each of the categories you have identified, and consistent with the claims and defenses in this matter.

Of course, Rimini Street asks you to confirm that Oracle will comply with its duties to preserve evidence relevant to its claims, and Rimini Street's Counterclaims and Defenses, paying special attention to the following non-exhaustive categories of information:

1. The documents, programs, data and files that were allegedly improperly accessed, copied, or made use of by the Defendants;
2. The machines, including computers, computer systems and/or computer networks, that housed the programs, data and files that were allegedly improperly accessed, copied, or made use of by the Defendants;
3. Logs or other records of software shipments by Plaintiffs to Rimini Street or Rimini Street clients and records concerning Plaintiffs' policies regarding shipping software, changes to such policies and reasoning for these changes;
4. Logs or other records of Defendants' alleged access of Plaintiffs' websites, records concerning the design and monitoring of these websites, records concerning the use of automated tools or "crawlers" on these websites and records concerning the terms and conditions for using these websites;
5. Records of communications by Oracle to third parties regarding Seth Ravin and Rimini Street, including communications to Rimini Street's

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.



customers and potential customers, Oracle customers, the media, analysts and others;

March 29, 2010
Page 2

6. Records of Defendants' alleged interference with, or damage to, the integrity and functionality of Plaintiffs' computer systems and data, including all computer and network performance data for each computer allegedly interfered with or damaged;
7. Records of the terms and conditions of Plaintiffs' contracts and licenses for PeopleSoft, JD Edwards and Siebel software and for Oracle databases and copies of the contracts and licenses for these products and databases; and
8. Records of Plaintiffs' protection and enforcement of copyrights relating to PeopleSoft, JD Edwards and Siebel software.
9. Records of communications between Oracle and third parties regarding contractual terms and restrictions governing the possession and usage of Oracle software products.

We look forward to your confirmation that Plaintiffs are preserving the materials described in the categories above.

Very truly yours,

/s/Robert H. Reckers

Geneva
Houston
Kansas City
London
Miami
Orange County
San Francisco
Tampa
Washington, D.C.

EXHIBIT P

1 BOIES, SCHILLER & FLEXNER LLP
 RICHARD J. POCKER (NV Bar No. 3568)
 2 300 South Fourth Street, Suite 800
 Las Vegas, NV 89101
 3 Telephone: (702) 382-7300
 Facsimile: (702) 382-2755
 4 rpocker@bsfllp.com

5 BOIES, SCHILLER & FLEXNER LLP
 STEVEN C. HOLTZMAN (*pro hac vice*)
 6 FRED NORTON (*pro hac vice*)
 KIERAN P. RINGGENBERG (*pro hac vice*)
 7 1999 Harrison Street, Suite 900
 Oakland, CA 94612
 8 Telephone: (510) 874-1000
 Facsimile: (510) 874-1460
 9 sholtzman@bsfllp.com
 fnorton@bsfllp.com
 10 kringgenberg@bsfllp.com

11 Attorneys for Oracle USA, Inc., Oracle
 America, Inc., and Oracle International
 12 Corporation

BINGHAM MCCUTCHEN LLP
 GEOFFREY M. HOWARD (*pro hac vice*)
 THOMAS S. HIXSON (*pro hac vice*)
 KRISTEN A. PALUMBO (*pro hac vice*)
 Three Embarcadero Center
 San Francisco, CA 94111-4067
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 geoff.howard@bingham.com
 thomas.hixson@bingham.com
 kristen.palumbo@bingham.com

DORIAN DALEY (*pro hac vice application
 to be submitted*)
 DEBORAH K. MILLER (*pro hac vice*)
 JAMES C. MAROULIS (*pro hac vice*)
 ORACLE CORPORATION
 500 Oracle Parkway
 M/S 5op7
 Redwood City, CA 94070
 Telephone: 650.506.4846
 Facsimile: 650.506.7114
 dorian.daley@oracle.com
 deborah.miller@oracle.com
 jim.maroulis@oracle.com

14 UNITED STATES DISTRICT COURT
 15 DISTRICT OF NEVADA

17 ORACLE USA, INC., a Colorado corporation,
 ORACLE AMERICA, INC., a Delaware
 18 corporation; and ORACLE INTERNATIONAL
 CORPORATION, a California corporation,

19 Plaintiffs,

20 v.

21 RIMINI STREET, INC., a Nevada corporation;
 and SETH RAVIN, an individual,

22 Defendants.
 23

Case No. 2:10-cv-0106-LRH-PAL

**ORACLE'S FIRST NOTICE OF
 DEPOSITION PURSUANT TO
 FED. R. CIV. P. 30(b)(6)**

1 TO: Defendant Rimini Street, Inc., by and through its attorney of record, Eric A.
2 Buresh; Shook, Hardy & Bacon LLP; 2555 Grand Blvd., Kansas City, MO 64108.

3 PLEASE TAKE NOTICE that the named plaintiffs ("Oracle") will take the deposition of
4 defendant Rimini Street, Inc. ("Rimini") pursuant to Fed. R. Civ. P. 30(b)(6), on June 14, 2010 at
5 9:30 a.m. The deposition shall take place at the office of Boies, Schiller & Flexner LLP, 300
6 South Fourth Street, Suite 800, Las Vegas, NV 89101, commencing at the designated date and
7 time, and shall continue on consecutive days thereafter until completed. The deposition will be
8 videotaped and stenographically recorded by a person authorized by law to administer oaths.
9 Pursuant to Fed. R. Civ. P. 30(b)(6), Rimini shall designate one or more officers, directors,
10 managing agents or other persons who consent to testify on its behalf with respect to the topics
11 set forth in Schedule A. At least five business days prior to the date of the deposition, Rimini is
12 also requested to provide Oracle's counsel with written notice of the name(s) and position(s) of
13 the designee(s) who will testify on behalf of Rimini, and to identify the matters to which each
14 designee will testify.

15 DATED: June 2, 2010

BOIES SCHILLER & FLEXNER LLP

16
17 By: 

18 Kieran P. Ringgenberg
19 Attorneys for Oracle USA, Inc., Oracle
20 America, Inc., and Oracle International
21 Corporation
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SCHEDULE A

I. DEFINITIONS AND INSTRUCTIONS

In addition to the definitions set forth in the Federal Rules of Civil Procedure, the following definitions and instructions apply to each topic contained herein, and are deemed to be incorporated in each of said requests:

1. The term “Oracle” means all named plaintiffs in this case, and all of their present and former officers, directors, agents, consultants, attorneys, employees, or other persons acting for or on behalf of any of them, and all of their parents, subsidiaries and affiliates.

2. The terms “Rimini” and “you” (or “your”) refer Rimini Street, Inc., and all of its present and former officers, directors, agents, consultants, attorneys, employees – including Seth Ravin – or other persons acting for or on behalf of any of them, and all of its parents, subsidiaries and affiliates.

3. The term “document(s)” shall be synonymous in meaning and equal in scope to the broadest meaning provided by Rule 34 of the Federal Rules of Civil Procedure, including without limitation, hard copies, electronic documents, electronic or computerized data compilations, software, software images, or downloads. This term shall apply to documents, whether in hard copy or electronic form, on your computers or the computers of your employees and independent contractors or consultants, whether provided by you to such individuals or otherwise

4. The term “this Action” refers to this lawsuit, captioned as *Oracle USA, Inc., Oracle America, Inc., and Oracle International Corporation v. Rimini Street, Inc. and Seth Ravin*, Case No. 2:10-cv-0106-LRH-PAL (D. Nev.).

5. Unless otherwise stated, the time period covered by these topics is the time period beginning January 1, 2005.

1 **II. TOPICS**

2 1. The general configuration and operation of any computers, computer systems,
3 servers, electronic storage environments, or network devices identified in Rimini Street Inc.'s
4 Objections and Responses to Plaintiffs' First Set of Interrogatories, Nos. 6, 7, 8, 9, 10, 11 or 12.

5 2. Any steps taken by or on behalf of Rimini to preserve documents that may be
6 relevant to the claims, counterclaims, or defenses in this Action, including any litigation hold
7 notice provided to Rimini employees or others who hold documents in Rimini's possession,
8 custody, or control.

9 3. The collection of documents for potential production in this Action by or on
10 behalf of Rimini, including the process used to identify documents to be collected.

11 4. Rimini's disaster recovery backup systems and procedures, including the scope
12 and frequency of backups and any steps to modify Rimini's disaster recovery backup procedures
13 (including recycling and retention of media) in connection with this Action.

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1 BOIES, SCHILLER & FLEXNER LLP
2 RICHARD J. POCKER (NV Bar No.
3 3568)
4 300 South Fourth Street, Suite 800
5 Las Vegas, NV 89101
6 Telephone: (702) 382-7300
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8 rpocker@bsfllp.com

9 BOIES, SCHILLER & FLEXNER LLP
10 STEVEN C. HOLTZMAN (*pro hac vice*)
11 FRED NORTON (*pro hac vice*)
12 KIERAN P. RINGGENBERG (*pro hac*
13 *vice*)
14 1999 Harrison Street, Suite 900
15 Oakland, CA 94612
16 Telephone: (510) 874-1000
17 Facsimile: (510) 874-1460
18 sholtzman@bsfllp.com
19 fnorton@bsfllp.com
20 kringgenberg@bsfllp.com

21 Attorneys for Oracle USA, Inc., Oracle
22 America, Inc., and Oracle International
23 Corporation

BINGHAM MCCUTCHEN LLP
GEOFFREY M. HOWARD (*pro hac vice*)
THOMAS S. HIXSON (*pro hac vice*)
KRISTEN A. PALUMBO (*pro hac vice*)
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Facsimile: 415.393.2286
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thomas.hixson@bingham.com
kristen.palumbo@bingham.com

DORIAN DALEY (*pro hac vice*
application to be submitted)
DEBORAH K. MILLER (*pro hac vice*)
JAMES C. MAROULIS (*pro hac vice*)
ORACLE CORPORATION (*pro hac vice*)
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M/S 5op7
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dorian.daley@oracle.com
deborah.miller@oracle.com
jim.maroulis@oracle.com

14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA
16

17 ORACLE USA, INC., a Colorado
18 corporation; ORACLE AMERICA, INC., a
19 Delaware corporation; and ORACLE
20 INTERNATIONAL CORPORATION, a
21 California corporation,

22 Plaintiffs,

23 v.

24 RIMINI STREET, INC., a Nevada
25 corporation; SETH RAVIN, an individual;,
26
27
28

Defendants.

CASE NO. 2:10-cv-0106-LRH-PAL

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

At the time of service I was over 18 years of age and **not a party to this action**. My business address is 1999 Harrison Street, Suite 900, Oakland, CA 94612.

On June 2, 2010, I served the following documents:

(1) **ORACLE'S FIRST NOTICE OF DEPOSITION PURSUANT TO
FED. R. CIV. P. 30(b)(6)**

I served the documents on the **persons** below, as follows:

Mark Tratos, Esq.
Brandon Roos, Esq.
Leslie A.S. Godfrey, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy
Ste 400 North
Las Vegas, NV 89169
tratosm@gtlaw.com
roosb@gtlaw.com
godfrey1@gtlaw.com

Michael B. Levin, Esq.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
mlevin@wsgr.com

Jonathan M. Jacobson, Esq.
Wilson Sonsini Goodrich & Rosati
1301 Avenue of the Americas, 40th Floor
New York, NY 10019
jjacobson@wsgr.com

Eric Buresh, Esq.
Shook, Hardy & Bacon L.L.P.
2555 Grand Blvd.
Kansas City, Missouri 64108
EBURESH@shb.com

Robert H. Reckers, Esq.
Shook, Hardy & Bacon L.L.P.
600 Travis Street, Suite 1600
Houston, Texas 77002
Telephone: (713) 227-8008
RRECKERS@shb.com

The documents were served pursuant to FRCP 5(b) **by sending it by electronic mail**. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission,

1 any electronic message or other indication that the transmission was unsuccessful.

2 I hereby certify that I am employed in the office of a member of the Bar of this
3 Court at whose direction the service was made. I declare under penalty of perjury under
4 the laws of the United States of America that the foregoing information contained in the
Certificate of Service is true and correct.

5 Date: June 2, 2010

6 
7 Jessica Chavez

EXHIBIT Q

From: Reckers, Robert H. (SHB) [mailto:RRECKERS@shb.com]
Sent: Friday, August 13, 2010 8:47 AM
To: Kieran Ringgenberg
Subject: RE: Oracle v. Rimini

Kieran,

The initial hold notice was sent on Feb. 4, 2010.

As I indicated at the depo, we'll reflect the notices on Rimini's priv. log.

Thanks, Rob

From: Kieran Ringgenberg [mailto:kringgenberg@BSFLLP.com]
Sent: Thursday, August 12, 2010 7:35 PM
To: Reckers, Robert H. (SHB)
Subject: Re: Oracle v. Rimini

Rob:

Would you please confirm to us the date the initial hold notice was sent?

From: Reckers, Robert H. (SHB) <RRECKERS@shb.com>
To: Kieran Ringgenberg
Cc: jim.maroulis@oracle.com <jim.maroulis@oracle.com>; thomas.hixson@bingham.com <thomas.hixson@bingham.com>; kristen.palumbo@bingham.com <kristen.palumbo@bingham.com>; Buresh, Eric A. (SHB) <EBURESH@shb.com>; Sykes, Terry R. (SHB) <TSYKES@shb.com>; Sexton, Rhonda (SHB) <RSEXTON@shb.com>
Sent: Tue Aug 10 16:29:33 2010
Subject: Oracle v. Rimini

Kiernan,

This is in response to your letter of Aug. 9, requesting a legible copy of the document bates labeled RSI00005858-95. I have attached herewith a native copy of this document.

Given the size of the attachment, please confirm receipt of this email.

Thanks, Rob



Robert H. Reckers
Associate
JP Morgan/Chase Tower
600 Travis, Suite 1600
Houston, TX 77002-2992
PHONE: 713.227.8008 x65014
FAX: 713.227.9508
RRECKERS@shb.com

From: Denise Nasca [<mailto:dnasca@BSFLLP.com>]
Sent: Monday, August 09, 2010 7:03 PM
To: Reckers, Robert H. (SHB)
Cc: Kieran Ringgenberg; jim.maroulis@oracle.com; thomas.hixson@bingham.com;
kristen.palumbo@bingham.com
Subject: Oracle v. Rimini

Dear Mr. Reckers:

Please see the attached letter of today's date from Kieran P. Ringgenberg.

Thank you.

Denise Nasca

Legal Assistant to Kieran P. Ringgenberg
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
Direct: (510) 874-1010
Fax: (510) 874-1460
Email: dnasca@bsfllp.com
www.bsfllp.com

IRS Circular 230 disclosure:

To ensure compliance with requirements imposed by the IRS, unless we expressly state otherwise, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

The information contained in this electronic message is confidential information intended only for the use of the named recipient(s) and may contain information that, among other protections, is the subject of attorney-client privilege, attorney work product or exempt from disclosure under applicable law. If the reader of this electronic message is not the named recipient, or the employee or agent responsible to deliver it to the named recipient, you are hereby notified that any dissemination, distribution, copying or other use of this communication is strictly prohibited and no privilege is waived. If you have received this communication in error, please immediately notify the sender by replying to this electronic message and then deleting this electronic message from your computer. [v.1]

Mail Gate made the following annotations on Tue Aug 10 2010 15:29:39

CONFIDENTIALITY NOTICE: This e-mail message including attachments, if any, is intended for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any

unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Thank you.

The information contained in this electronic message is confidential information intended only for the use of the named recipient(s) and may contain information that, among other protections, is the subject of attorney-client privilege, attorney work product or exempt from disclosure under applicable law. If the reader of this electronic message is not the named recipient, or the employee or agent responsible to deliver it to the named recipient, you are hereby notified that any dissemination, distribution, copying or other use of this communication is strictly prohibited and no privilege is waived. If you have received this communication in error, please immediately notify the sender by replying to this electronic message and then deleting this electronic message from your computer. [v.1]

Mail Gate made the following annotations on Fri Aug 13 2010 10:47:29

CONFIDENTIALITY NOTICE: This e-mail message including attachments, if any, is intended for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Thank you.

EXHIBIT R



August 18, 2010

Robert H. Reckers

VIA E-MAIL

Kieran P. Ringgenberg
Boies, Schiller & Flexner LLP
1999 Harrison Street Suite 900
Oakland, CA 94612
kringgenberg@bsfllp.com

JPMorgan Chase Tower
600 Travis Street, Suite 1600
Houston
Texas 77002-2992
713.227.8008
713.227.9508 Fax
reckers@shb.com

Re: *Oracle USA, Inc. et al. v. Rimini Street, Inc. and Seth Ravin*
Case No. 2:10-cv-0106-LRH-PAL (D. Nev. filed Jan. 25th, 2010)

Dear Kieran:

I write in response to your letter of August 13, 2010. While Rimini has repeatedly attempted to work with Oracle in good faith to address any and all preservation and collection concerns, Oracle has responded to Rimini's efforts with increasingly onerous demands based on mischaracterizations of the parties' exchanges. Your most recent letter continues this pattern of conduct. Once the misrepresentations contained in your letter are corrected, Oracle's present demands are legally unjustified and unsupported by the factual record.

Your letter raises two issues: Rimini's supposed failure to meet its preservation obligations; and Rimini's supposed failure to produce a knowledgeable 30(b)(6) witness on document collection issues. I will address each of these issues in turn.

I. Document Preservation

Your characterization of Rimini's preservation efforts relies on two incorrect premises: (1) that "Rimini did not take *any action* to preserve evidence until well after this case was filed"; and (2) that "there are entire categories of data that Rimini has apparently failed to preserve."

First, as we have informed you, Rimini's initial hold notice was issued February 4, 2010 – *ten days after this case was filed*.¹ This is hardly an unreasonable delay, particularly

¹ Your attempt to point out a "conflict" between my representation as to the date of the letter and the witnesses' "sworn" testimony is disingenuous. As you know, the witness testified that he could not remember the exact date of the email, and attempted an estimate – *at your request*. Shortly thereafter, I provided you the true date of this specific email. Your attempt to create the appearance of impropriety from such a triviality is disheartening.

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given that Rimini is a small company, has not previously been involved in substantial litigation, and does not have in-house litigation counsel. Further, Oracle had not communicated with Rimini in over a year, and at no point had the possibility of future litigation become probable. As such, Rimini was under no obligation to begin preservation efforts until this litigation began. *In re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (“The future litigation must be ‘probable,’ which has been held to mean ‘more than a possibility.’”).

Moreover, in contrast to your characterizations, Rimini is not relying on “employee discretion” to meet its document preservation obligations. As Rimini’s witness Mr. Dones testified, shortly after Oracle’s complaint was filed Rimini disabled certain delete functionality. Rimini has also monitored preservation compliance by periodically reminding employees of their ongoing obligations to preserve any and all potentially relevant materials, communicating directly with key employees about discovery obligations, and taking steps to assure that backup media is retained, identified and secured against loss. For instance, as we informed you during the parties’ meet and confer on May 21, 2010, Rimini had, at that point, already collected the potentially relevant documents from each of the thirty key custodians identified by counsel. Such collection efforts ensure proper preservation and were elaborated on by Mr. Dones during his deposition. How Oracle can characterize Rimini’s preservation efforts as “left to individual employees” is truly perplexing, and Rimini is confident that it has more than complied with its preservation obligations.

Turning to the “entire categories of data that Rimini has apparently failed to preserve,” you mention “log files” that are supposedly destroyed every time the “Customer Connect Extract Program” is run. However, Rimini has repeatedly informed Oracle that it terminated the use of extract programs in January of 2009. Further, Oracle discontinued its “Customer Connect” website in 2008. So, the “Customer Connect Extract Program” has long been retired, and any log files generated by this program, to the extent they were in existence when the litigation began, are properly being preserved. Speaking more broadly, we are not aware of any system or log files reflecting relevant information that are being “destroyed or overwritten,” and your allegations of “gross inadequacy” in Rimini’s preservation efforts find no factual support.

Your letter also refers to data generated through the use of the Yahoo! Instant Messenger program. As indicated by Mr. Dones, Rimini does not have its own instant messenger system, though some employees use a free Internet-based system provided by Yahoo!. Each employee who chose to use Yahoo! Messenger made his or her own decision, well before the litigation, whether to archive or not. When the litigation commenced, those who had been archiving messages were instructed by counsel to continue to archive messages and to continue to preserve such archives. Further, it is our understanding that

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certain employees decided to begin archiving their messages after the litigation commenced. These archives are being preserved as well.

Turning to your demand that Rimini begin archiving instant messages of all employees, I note that, given the nature of Oracle's allegations, it is unlikely that the Yahoo! Instant Messenger program will generate data relevant to this matter, and the collection and production of data from this program would likely prove unduly burdensome. Certainly, details regarding the processes underlying Oracle's allegations are far more likely to be reflected in traditional documents and correspondence than instant messages.

Further, for those employees that use Yahoo! Instant Messenger and who were not previously archiving, we are not aware of any obligation to create documents (i.e., archives) that are not maintained in the ordinary course of business. *See, e.g., Convolve v. Compaq*, 223 F.R.D. 162 (S.D.N.Y. 2004) ("the data at issue here are ephemeral. . . . No business purpose ever dictated that they be retained, even briefly."). And apparently Oracle was not aware of such an obligation either as it did not identify this as an issue in its extensive correspondence regarding items it wanted preserved and collected. Nevertheless, in an effort to avoid unnecessary disputes, Rimini is willing to begin preserving its employees' instant messaging data for employees who were not already archiving so the parties may move on to more important matters.

With respect to the "necessary remedial measures" demanded by Oracle, such measures are predicated on your unsupported allegations that Rimini's preservation efforts have been grossly inadequate. As previously explained, your allegations of inadequacy find no factual support, and, thus, Oracle's demanded measures are not warranted.

You first demand that Rimini insure continuing compliance with preservation obligations by archiving instant messages and creating backup copies of relevant files. As previously set forth, Rimini has ensured such compliance, has created the necessary backup copies and is willing to begin archiving instant messages. To the extent Oracle has additional preservation measures in mind, Rimini remains willing to consider any reasonable requests.

You second demand that Rimini take forensic copies of all relevant custodians' media. As we have reiterated on numerous occasions, Rimini Street does not agree that forensic copying is necessary in this case or that Oracle has or can establish good cause for this unconventional preservation measure. Certainly, forensic preservation is not necessary for each and every employee that is likely to have relevant documents, and broadly employing this form of data preservation would create substantial expense and interruption to Rimini Street's business. As the Sedona Principles state: "Absent a showing of special need and relevance, a responding party should not be required to

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preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.”

Indeed, computer forensics are considered an extraordinary discovery measure and are typically created only after evidence of spoliation has surfaced. *See McCurdy Group v. American Biomedical Group, Inc.*, 9 Fed. Appx. 822, 831 (10th Cir. 2001); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002); *Orrell v. Motorcarparts of America, Inc.*, 2007 U.S. Dist. LEXIS 89524 (W.D.N.C. Dec. 5, 2007). And, even in light of spoliation, in virtually every case the party requesting forensics must bear the associated expense. *See, e.g., Koninklijke Philips Electronics N.V. v. KXD Technology, Inc.*, 2007 U.S. Dist. LEXIS 20205 (D. Nev. Mar. 20, 2007); *Balboa Threadworks*, 2006 U.S. Dist. LEXIS 29265 *13; *Orrell*, 2007 U.S. Dist. LEXIS 89524 (W.D.N.C. 2007).

Yet even though Oracle has shown no special need for forensics and though such measures would burden Rimini’s business operations, in the spirit of cooperation and to address Oracle’s concerns, Rimini agreed, back on May 25, 2010, to submit to the requested measures provided Oracle bear the associated monetary expense. Again, that the party requesting forensics bears the cost is the standard practice for virtually every case where forensics are conducted. We again reiterate that, even though Oracle has not shown adequate cause, Rimini is willing to submit to computer forensics provided Oracle bear the associated expense.

II. Document Collection

Your letter also contends that Rimini’s designee was not prepared to testify regarding the collection of documents by Rimini, and you demand that Rimini provide Oracle four items of information – namely, the number and identity of custodians from whom documents have been collected, the sources of collected information and whether search terms or automated methods were used to collect documents. But each of these items reflects either information that the witness competently testified about, information already in Oracle’s possession or information subject to work product protection.

Turning first to the number and identity of custodians from whom information was collected, as mentioned, *supra*, we informed you during the parties meet and confer on May 21, 2010, Rimini had at that point already collected the potentially relevant documents from each of the thirty key custodians identified by counsel. Moreover, as mentioned by my letters to Mr. Norton dated May 25, 2010 and June 3, 2010, Rimini Street had collected a substantial number of documents from the computers of its key custodians around the country. Though Mr. Dones did not recall the exact number of custodians, he testified regarding this initial collection of individual data, explaining that he was given the list of these custodians so he could allow their user data to be collected

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from Rimini's file system. Consistent with Mr. Dones' testimony, there have been no additional custodians from which collections have been made, so the number of custodians from whom information was collected remains at thirty.

As to the listing of the key custodians (*i.e.*, those individuals most likely to have relevant documents), such a list clearly reflects the mental impressions of counsel and are subject to work product protections. *In re New York Renu with Moistureloc Prod. Liab. Litig.*, 2008 U.S. Dist. LEXIS 88515, at *51 (D.S.C. May 6, 2008) ("Certainly compiling a list of those with relevant documents involves trial preparation, and disclosure of that list could reveal mental impressions concerning claims or defenses."). And, even if the names were not protected from disclosure, having a witness memorize a list of 30 names is not required for a 30(b)(6) deposition. *EEOC v. American Int'l Group, Inc.*, 1994 WL 376052, at *3 (S.D.N.Y. July 18, 1994) ("Rule 30(b)(6) is not designed to be a memory contest.").² The fact that the witness could not testify as to information protected by attorney work product hardly evidences a lack of preparedness.

With respect to the sources of documents, your assertion that "Rimini's designee was unable to . . . specify from what electronic sources documents were collected" is incorrect. Beyond the previously mentioned collections from individual's computers, Mr. Dones testified that counsel, at their discretion, collected documents from Rimini's SharePoint platform, its email system and its network file system. With respect to the network file system, he testified that collections were taken from the department drives and the user data but not from client archives or database files. Of the department drives, Mr. Dones' testimony reflects that collections were taken for the following departments: PeopleSoft, JD Edwards, Siebel, Client Care and Success and Sales. Given this testimony, your characterization of the record is utterly unsupported.

Finally, you demand to know whether search terms or automated methods were used to collect documents. The answer to your question is no. Consistent with Mr. Dones' testimony, counsel worked with the relevant personnel to obtain access to and then select the documents included in the initial wave of collections. No search terms or other automated methods were employed at this collection stage.

Though we remain willing to meet and confer with Oracle as to any additional subject matter it believes it is entitled, it is telling that, following Mr. Dones' deposition, Oracle was in possession of each non-privileged item of information it presently demands. Though you argue that the witness was not prepared, the simple truth is that the

² Though Rimini contends that the list of its custodians is subject to work product protection, Rimini will agree to provide Oracle this list provided Oracle agrees to provide Rimini with corresponding information and also agrees that this exchange does not constitute a waiver of any applicable privilege or protection.

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discoverable information regarding Rimini collection efforts can be succinctly described: counsel selected key custodians and data stores likely to contain relevant information; counsel was granted access to these data stores and the files of the key custodians (i.e., laptops, emails and network user data); and counsel selected the files to be collected based on their own discretion and without the aid of automated or search tools. This is precisely the collection process described by Mr. Dones, and Rimini does not see any justification for the additional deposition demanded by your letter.

In conclusion, I simply cannot stress enough that Oracle's charge of "stonewalling" is without merit. Rimini's goal in this matter has been to move forward expeditiously and resolve this case on its merits. We have long hoped that this was a goal shared by Oracle, and we remain cautiously optimistic that the parties can work together to resolve any remaining issues.

Please feel free to contact me with questions or concerns.

Sincerely,

/s/Robert H. Reckers

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EXHIBIT S



August 20, 2010

Robert H. Reckers

VIA E-MAIL

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Re: *Oracle USA, Inc. et al. v. Rimini Street, Inc. and Seth Ravin*
Case No. 2:10-cv-0106-LRH-PAL (D. Nev. filed Jan. 25th, 2010)

Dear Kieran:

This letter pertains to the deposition of Rimini Street conducted pursuant to Rule 30.b.6 on August 12, 2010. In the last few days, it has come to the attention of Rimini's counsel that the testimony of Rimini's designee, Mr. Dones, was not accurate in one aspect regarding Rimini's preservation of emails. The purpose of this letter is to identify the error and to provide Oracle an accurate description of Rimini's preservation efforts with respect to emails. To the extent Oracle has follow-up questions with respect to the erroneous testimony, Rimini will be happy to provide verified responses to the extent Oracle's questions seek information that is not otherwise protected.

As you may recall, Mr. Dones testified that Rimini disabled the delete functionality from its email system as part of its preservation efforts in this case. Earlier this week, one of the members of Rimini's legal team questioned the accuracy of this testimony. Upon further investigation, we have concluded that the testimony was, in fact, incorrect. Though Mr. Dones was prepared on this issue directly, it appears that Mr. Dones inadvertently developed a misunderstanding. His testimony reflected this honest but incorrect understanding.

While Rimini has not disabled the delete functionality, Rimini has taken reasonable steps to ensure the proper preservation of emails. As background, there are no mail box size quotas imposed, and there is no auto-delete agent employed on Rimini Street's emails. As such, Rimini's email system maintains any emails not designated for deletion, including emails of departed employees (which are preserved in "disabled" state to prevent any deletion or usage).

With respect to preservation efforts for this litigation, Rimini made a copy or "snapshot" of its entire email system early in the litigation to ensure proper preservation of any emails existing at that time. Subsequently, counsel collected the email accounts of the 30 key custodians, and, of course, there will be likely additional email collections as

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necessary during the course of discovery. Additionally, monthly full disaster recovery backups of the email environment are being created and preserved.

In addition to copying and collecting email data, Rimini has both instructed and reminded its employees not to delete email that may have any potential relevance to this matter. As mentioned in my letter to you on August 18, 2010, Rimini has monitored compliance with these preservation directives by periodically reminding employees of their ongoing obligations to preserve any potentially relevant materials and by communicating directly with key employees about discovery obligations. As the total volume of stored emails has increased nearly 50 percent over the last 6 months, Rimini has every reason to believe that its employees are indeed preserving potentially relevant emails.

Though the erroneous testimony is regrettable, it was entirely inadvertent. Upon recognizing the inaccuracy, Rimini has moved quickly and in good faith to alert Oracle. Further, as mentioned above, Rimini is prepared to follow-up with further information to the extent Oracle requires further information to clarify the error.

Please feel free to contact me with questions or concerns.

Sincerely,

/s/Robert H. Reckers

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EXHIBIT T

DOCUMENT FILED UNDER SEAL

EXHIBIT U

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EXHIBIT V

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EXHIBIT W

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EXHIBIT X

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EXHIBIT AA

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EXHIBIT BB

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EXHIBIT CC

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EXHIBIT DD

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EXHIBIT EE

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August 13, 2010

VIA E-MAIL

Robert H. Reckers, Esq.
Shook, Hardy & Bacon LLP
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Email: rreckers@shb.com

**Re: *Oracle USA Inc., et al. v. Rimini Street, Inc. and Seth Ravin,*
No. 2:10-cv-00106 (D. Nev. filed Jan. 25, 2010)**

Dear Rob:

I write to address two fundamental problems exposed by Rimini Street's 30(b)(6) deposition testimony of August 12, 2010. First, the witness's testimony revealed that Rimini has failed to adequately preserve evidence – failures that almost certainly have already led to the spoliation of evidence relevant to the central issues of this litigation. Second, Rimini failed to produce a witness who could testify knowledgeably on topic 3 in the deposition notice, that is, Rimini's collection of documents in this action.

These are crucial matters that need to be addressed immediately. We demand that Rimini Street confirm in writing that it will take the necessary steps identified below, and that such confirmation be provided by the close of business on August 16. If Rimini will not do so, we will need to seek intervention from the Court.

I. Document Preservation

Rimini's 30(b)(6) designee made clear that Rimini has not met its obligations to preserve relevant evidence, in at least two important respects.

A. Rimini's Late and Inadequate Hold Notice

To begin, Rimini did not take *any action* to preserve evidence until well after this case was filed. The witness said the first step Rimini took to preserve evidence was to send an e-mail to employees on February 27, 2010, more than a month after this case was

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filed. You have subsequently represented that the e-mail was sent on February 4 – ten days after the complaint was filed. (This conflict between your representation and the witness’s sworn testimony is but one illustration of the inadequacy of your efforts to produce a truly knowledgeable witness under Rule 30(b)(6) on an issue clearly central to the noticed topics.) Even if the Rule 30(b)(6) designee’s testimony was wrong, sending an initial preservation e-mail on February 4 was inadequate to comply with Rimini’s obligations. The “duty to preserve documents attaches ‘when a party should have known that the evidence may be relevant to future litigation.’” *In re Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060, 1068 (N.D. Cal. 2006) (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). Rimini’s duty certainly attached earlier – probably far earlier – than February 4, 2010.

Moreover, the obligation to preserve evidence does not end with the issuance of a legal hold notice. Counsel must take “affirmative steps” to monitor compliance with the litigation hold; “it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.” *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008) (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)); *see also Housing Rights Center v. Sterling*, 2005 WL 3320739, at *5 (C.D. Cal. 2005) (“A party’s discovery obligations do not end with the implementation of a ‘litigation hold’ – to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents”).

Rimini’s designee testified that Rimini has done nothing to ensure that Rimini employees are preserving relevant documents aside from sending a single follow-up email two months after distributing the litigation hold notice and disabling the delete function on Rimini’s e-mail and Sharepoint systems. Outside those narrow exceptions, Rimini has left it to individual employees to ensure that Rimini fulfills its preservation obligations. Relying on an employee’s discretion to ensure preservation is insufficient as a matter of law. *See, e.g., Treppel*, 249 F.R.D. at 118. Coupled with the designee’s inability to confirm that Rimini has preserved any data residing on individual employees’ computers (such as by imaging those computers), Rimini’s lapse in monitoring preservation creates a very real risk of spoliation.

B. Rimini’s Failure to Preserve Other Files and Data

Moreover, the likelihood that relevant evidence has been destroyed has been multiplied because there are entire categories of data that Rimini has apparently neglected to preserve. For example, Rimini has apparently made no efforts to preserve or archive

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instant messages, even though the 30(b)(6) designee testified that many employees regularly use Yahoo Instant Messenger to communicate within Rimini. Likewise, although the witness lacked knowledge about many of the systems in use at Rimini and the data that is created by them, it appears that little or nothing has been done to preserve system files that otherwise will be destroyed or overwritten – for example, the log files created when Rimini conducts mass downloads of Oracle software and support material. These log files are obviously relevant; they list which files Rimini is copying from Oracle. Rimini's own document states that the log files are overwritten (*i.e.*, destroyed) every time the process is run. The witness said that, as far as he knew, nothing was done to preserve these files. (To be clear, we do not mean to suggest that the witness's testimony was adequate in this or many other respects. It clearly was not.)

C. Necessary Remedial Measures

Given the gross inadequacy of Rimini's preservation efforts – exacerbated by the critical significance of electronic evidence in this case – several remedial measures are required. To begin, and in light of your past repeated refusal to do so, we demand that you immediately confirm that:

1. Rimini will take immediate steps to ensure employees' continuing compliance with the legal hold, including at a minimum archiving instant messages and preserving all relevant custodian and system files that exist as of now, both on active servers and client devices and on all backup and disaster recovery tapes or other systems; and
2. Rimini will immediately prepare and preserve forensic images of the hard drives of relevant custodians' computers to preserve evidence of deleted files and ensure compliance with the litigation hold.

Please confirm in writing that these measures will be taken. Please also subsequently confirm exactly what steps are completed and when they are completed. Please also identify all materials that have been deleted or otherwise destroyed since January 25, 2010 (the date this case was filed).

To be clear, we expect additional steps will be necessary to try to make up for Rimini's failure to preserve relevant evidence, including restoration of potentially multiple back-ups or disaster recovery tapes and systems. However, more information is needed to identify all that needs to be done. And, even then, it is likely that evidence has

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been destroyed that can never be recovered. We write now to demand that Rimini take immediate action to prevent the ongoing loss of relevant evidence.

II. Document Collection

Rimini failed to produce a witness who could testify regarding “the collection of documents for potential production in this Action by or on behalf of Rimini, including the process used to identify documents to be collected,” the third topic in Oracle’s Notice of Deposition. Rimini’s designee was unable to explain Rimini’s document collection process, provide even a rough estimation of the number of custodians from whom documents were collected, identify the general types or categories of documents that were collected, or specify from what electronic sources documents were collected. The designee was not even able to say whether any data had been collected from Rimini CEO’s Seth Ravin’s computer or allocated network storage. Instead, the designee repeatedly said that counsel performed collection and he did not know what was done.

“Once served with the deposition notice under Rule 30(b)(6), the responding party is required to produce one or more witnesses knowledgeable about the subject matter of the noticed topics,” even if the topic is outside the witness’s personal knowledge. *Great American Ins. Co. of New York v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008) (Leen, M.J.). Upon receiving the deposition notice, Rimini was required to “educate an appropriate Rule 30(b)(6) designee to provide knowledgeable answers reasonably available to the corporation, which include information ascertainable from project files and documents in the repository, information from past employees, witness testimony and exhibits, or any other sources available to the corporation, **including factual information learned through or from its counsel.**” *Id.* at 541 (emphasis added). Rimini’s failure to produce an adequately prepared Rule 30(b)(6) deponent is sanctionable. *Id.* at 542-43 (sanctioning party whose 30(b)(6) witness was unprepared to speak to topics in notice of deposition). That Rimini had over two months to prepare a witness to testify competently to its collection efforts makes its failure to do so even more troubling.

Rimini continues to represent to the Court that it wants to resolve this litigation as quickly as possible, but its actions belie its professed interest in efficiency. Over the course of several months, Oracle sent Rimini repeated requests to meet and confer concerning issues of document collection and preservation. Rimini refused Oracle’s requests, writing on June 3 that “the normal discovery process is the appropriate means for disclosing such information, to the extent it is non-privileged and discoverable.” But when Oracle attempted to follow the process that Rimini preferred by employing the

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“normal” discovery mechanism of a Rule 30(b)(6) deposition, Rimini produced a witness unable to speak meaningfully to the noticed topics.

Rimini cannot continue to stonewall Oracle’s attempt to obtain the most basic of information regarding the sufficiency of Rimini’s collection. Given the delays Rimini has already caused and in light of the need to make progress in advance of the next case management conference, we demand that Rimini provide a sworn, written response describing Rimini’s collection procedures, including the identity and number of custodians from whom you collected information, the other sources from which you collected information, and any search terms or automated methods you used to collect information. Please provide this written response by August 20. In addition, we demand that Rimini make a knowledgeable witness available on August 25 to answer any follow-up questions that arise from our review of your response. Should Oracle decide to depose this witness, it will not count against Oracle’s allotted number or hours of deposition. Because Rimini bears responsibility for the ignorance of its original designee, Oracle may demand another deposition, at Rimini’s expense, of a knowledgeable witness. *See Great American Ins. Co.*, 251 F.R.D. at 542-43.

Please contact me if you have questions concerning any of the demands outlined above. I look forward to your written confirmation you will take the essential steps outlined above by August 16.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Ringgenberg', with a long horizontal flourish extending to the right.

Kieran Ringgenberg

cc: Eric Buresh, Esq.
Aaron D. Ford, Esq.
Geoff Howard, Esq.
James C. Maroulis, Esq.

EXHIBIT FF

From: Reckers, Robert H. (SHB)[SMTP:RRECKERS@SHB.COM]
Sent: Monday, August 23, 2010 7:31:14 PM
To: Kieran Ringgenberg
Cc: 'jim.maroulis'; 'kristen.palumbo@bingham.com'; Fred Norton;
'thomas.hixson@bingham.com'; Steven Holtzman; Buresh, Eric A. (SHB)
Subject: RE: Oracle v. Rimini
Auto forwarded by a Rule

Kieran,

With respect to our conversation on Friday:

1. Per your request, Rimini is agreeable to proceeding with tomorrow's deposition at Bingham's San Francisco office at 9:30 am.
2. Rimini agrees to provide the below-mentioned declaration regarding steps taken to preserve and collect relevant evidence.
3. Rimini also agrees that it has preserved or will preserve logical copies/snapshots of servers used to directly provide service and support to its clients running Oracle software, namely Rimini's client archives, client environments, email, Devtrack, dotproject, WebCM, Rimini website, SharePoint, user home directories and department share drives. To the extent there are additional servers Oracle contends should be copied for preservation purposes, please let us know, and we will consider the request.
4. Though Rimini does not agree that formal briefing is proper in light of the comments in the Court's most recent case management order, Rimini agrees it will file its opposition to Oracle's motion on preservation and collection by August 31.
5. The below schedule for CMC statement exchanges is fine.



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From: Kieran Ringgenberg [mailto:kringgenberg@BSFLLP.com]
Sent: Friday, August 20, 2010 5:03 PM
To: Reckers, Robert H. (SHB)
Cc: jim maroulis; kristen.palumbo@bingham.com; Fred Norton; thomas.hixson@bingham.com; Steven Holtzman
Subject: Oracle v. Rimini

Rob:

I write to confirm a few points from our conversation today.

With regard to preservation and collection issues, you are going to confer with your client on whether Rimini will agree to (1) provide declaration(s) from individual(s) with firsthand knowledge describing comprehensively the steps taken to preserve and collect relevant evidence in this case; and (2) collect logical copies/snapshots of Rimini's servers. You will get back to us late Monday on these issues. Rimini will not agree to take forensic images of user hard drives at its own expense.

Assuming the parties cannot agree on the preservation and collection issues, Oracle will file a motion Tuesday, August 24, Rimini will file an opposition Tuesday, August 31, and Oracle file any reply on Friday, September 3.

With regard to other discovery issues, we agreed that, in order to create the joint submission requested by the Court for the 9/9/ CMC, a party complaining regarding another's discovery responses will provide its portion of a joint statement on those issues on Thursday, August 26. The opposing party will provide its portion on those issue on Tuesday, August 31. The complaining party will provide its final portion on of the joint statement by 3 pm on September 3. We will put them together and file with the CMC.

We did not discuss this, but it would also be good to work out a schedule on the exchange sections of the remainder of the CMC statement – say, Oracle will provide draft on 8/30, and Rimini will provide its portions by 9/1, and we will file it on 9/3.

I don't mean to suggest this was the entirety of our discussion; we discussed other issues. I just want to confirm these points now given the scheduling.

Best,

Kieran

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Mail Gate made the following annotations on Mon Aug 23 2010 21:31:15

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